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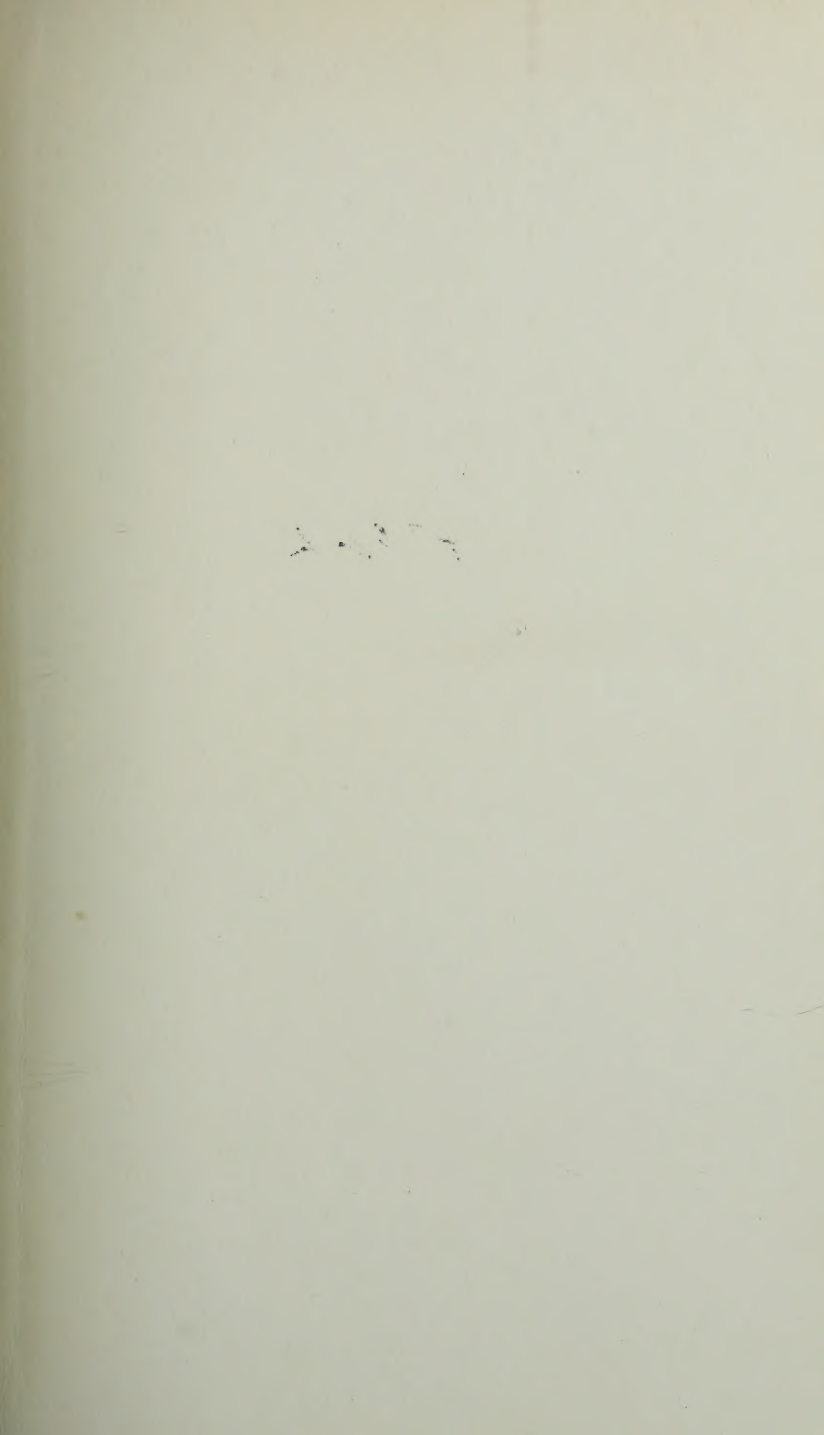
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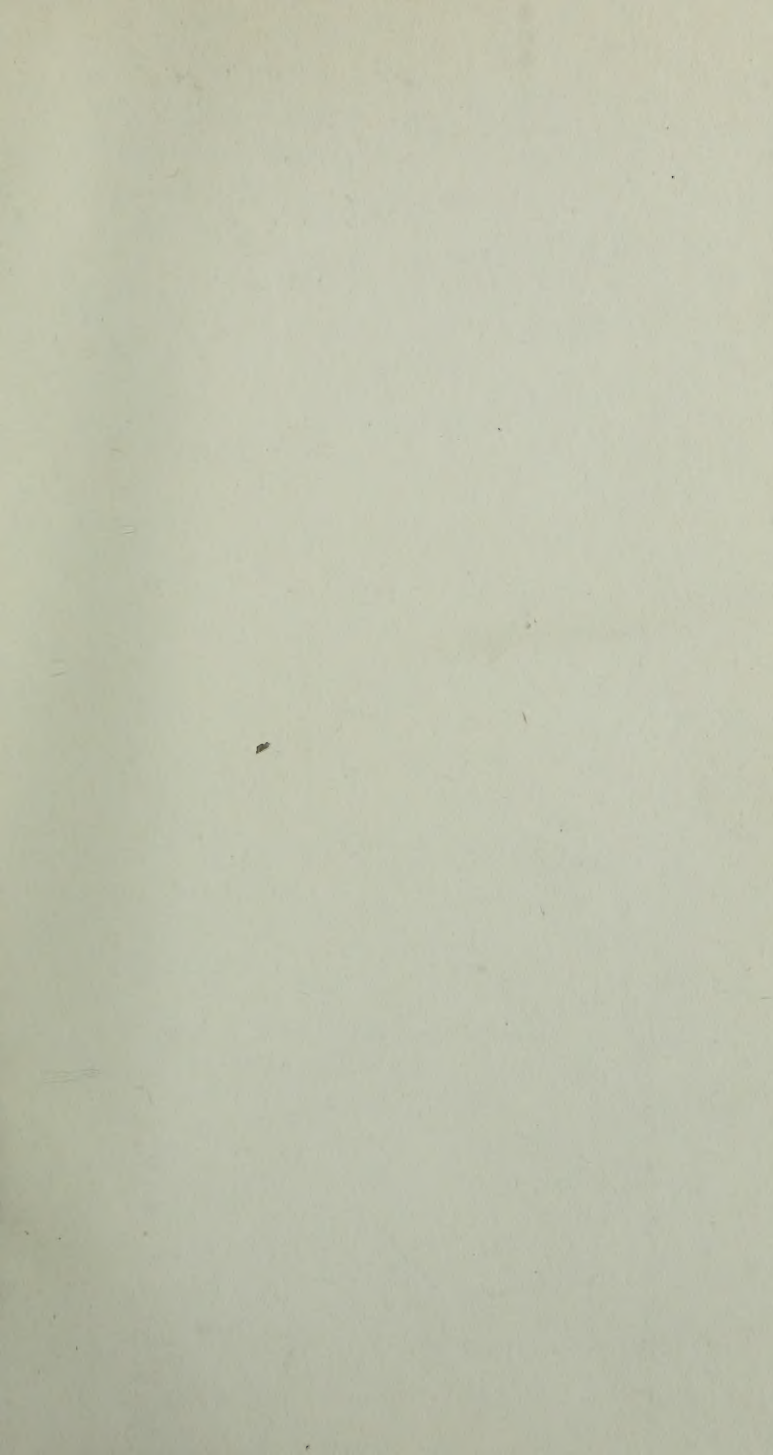
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No. 12546

9642

United States
Court of Appeals
For the Ninth Circuit.

JACK MAU,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy
of the Estate of Jack Mau, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

FILED

JUL 10 1950

PAUL P. O'BRIEN,
CLERK

No. 12546

United States
Court of Appeals
For the Ninth Circuit.

JACK MAU,

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vs.

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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639 S. Spring St.,
Los Angeles 14, Calif.

For Appellee:

CRAIG, WELLER & LAUGHARN,

111 West 7th St., Room 817,
Los Angeles 14, Calif.

In the District Court of the United States for the
Southern District of California

In Bankruptcy No. 46674-PH

In the Matter of

JACK MAU,

Bankrupt.

DEBTOR'S PETITION

Form No. 1

To the Honorable....., Judge
of the District Court of the United States for
the Southern District of California.

The Petition of Jack Mau, Residing at No. 624
So. Berendo Street, in the City of Los Angeles,
County of Los Angeles, State of California, by oc-
cupation a custom tailor (engaged in the business
of custom tailoring), respectfully represents:

1. Your petitioner has had his principal place
of business at 137 E. 7th Street, Los Angeles, Cali-
fornia, within the above judicial district, for a
longer portion of the six months immediately pre-
ceding the filing of this petition than in any other
judicial district.

2. Your petitioner owes debts and is willing to
surrender all his property for the benefit of his
creditors, except such as is exempt by law, and de-
sires to obtain the benefit of the Act of Congress
relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said act.

JACK C. SCHAPIRO &
DANIEL S. MALAMED,

/s/ DANIEL S. MALAMED,
Attorneys for Petitioner.

/s/ JACK MAU,
Petitioner.

State of California,
County of Los Angeles—ss.

I, Jack Mau, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according

to the best of my knowledge, information, and belief.

/s/ JACK MAU,
Petitioner.

Subscribed and sworn to before me this 12th day of November, 1948.

/s/ ELEANOR B. CURTIS,
Notary Public in and for said
County and State. [2*]

[Endorsed]: Filed November 15, 1948.

United States District Court
Southern District of California

ORDERS OF ADJUDICATION AND
OF GENERAL REFERENCE

At Los Angeles, in said District on November 15, 1948.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

*Page numbering stamped at bottom of page of original Transcript of Record.

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings herein-after mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number: 46,674-PH.

Title of Proceedings: Jack Mau.

Filed: 11-15-48.

Referee: Reuben G. Hunt, Esq., Los Angeles, Calif.

/s/ PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed November 15, 1948. [3]

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy No. 46, 674-PH

In the Matter of
JACK MAU,

Bankrupt.

AMENDED SPECIFICATIONS OF OBJECTION TO DISCHARGE OF BANKRUPT

Comes Now Paul W. Sampsell, the duly elected, qualified and acting Trustee for the Estate of the above named bankrupt, and objects to the discharge of the bankrupt from his debts, and by permission of the Court does file the following amended specifications, namely:

Specification No. 1.

That on or about July 26, 1948, the bankrupt obtained an extension of credit in the sum of \$730.92 from Walbrooke Clothes, Inc., of Trenton, New Jersey, by knowingly and fraudulently making, signing and delivering to the said Walbrooke Clothes, Inc., a materially false statement in writing respecting his financial condition in the means and by the manner as hereinafter specifically set forth, namely, that on July 26, 1948, the bankrupt was indebted to Walbrooke Clothes, Inc., for merchandise purchased by him on or about April 22, 1948, amounting to \$730.92 which was on July 26, 1948, long past due and unpaid. That said Walbrooke [4]

Clothes, Inc., wrote to the said bankrupt, calling his attention to the fact that said invoice was long past due, and demanded payment thereof by return of mail. That in response thereto the bankrupt upon receipt of said demand, wrote said creditor, Walbrooke Clothes, Inc., informing it in writing that he had the sum of \$12,500.00 in escrow which was to be released to him as soon as he could get a Court order and asked for a further extension of credit on the payment of said past due account. That in writing said letter the bankrupt meant to convey to said creditor the impression, thought, belief and idea that he had the sum of \$12,500.00 coming to him personally, and that out of said sum of \$12,500.00 the bankrupt would pay said indebtedness. That said statement in writing was materially false and known to the bankrupt to be materially false in that in truth and in fact there was no escrow and that there was no one in existence holding \$12,500.00, or any comparable sum to be released to the bankrupt under any circumstances whatsoever, nor was there any Court action pending from which the bankrupt could or would receive the sum of \$12,500.00 or any comparable sum.

That believing said false statement to be true, and believing that the bankrupt had the sum of \$12,500.00 in an escrow available to him, the said bankrupt, and believing that the bankrupt would pay said obligation out of said sum of \$12,500.00 which the bankrupt represented to be in escrow, the said creditor, Walbrooke Clothes, Inc., refrained from

pressing payment of said debt and the same never was paid and still remains due, owing and unpaid from said bankrupt to the said Walbrooke Clothes, Inc., and that by reason of the foregoing, the bankrupt has been guilty of one of the acts specified in Section 14-c of the National Bankruptcy Act, and by reason thereof should be denied his discharge.

Specification No. 2.

That subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy [5] herein, and on or about April 12, 1948, the bankrupt knowingly and fraudulently transferred certain real property consisting of a joint tenancy interest in and to real property located at 906-908 S. Sycamore Street, Los Angeles, California, described as follows:

Lot 34 of Tract 5690 as per map recorded in Book 60, page 76 of Maps in the office of the County Recorder in and for the County of Los Angeles, to his wife, Miriam Mau, with the actual intent on the part of the bankrupt to hinder, delay or defraud his creditors, and that by reason of the foregoing, the bankrupt has been guilty of one of the acts specified in Section 14-c of the National Bankruptcy Act, and should be denied his discharge.

Specification No. 3.

That subsequent to the first day of the twelve months immediately preceding the filing of the peti-

tion in bankruptcy herein, the bankrupt, Jack Mau, knowingly and fraudulently concealed certain personal property belonging to him consisting of a man's three-stone ring of one (1) carat weight, with the actual intent to hinder, delay or defraud his creditors, and that by reason of the foregoing, the bankrupt has been guilty of one of the acts specified in Section 14-c of the National Bankruptcy Act.

Wherefore, the trustee prays that the discharge of the bankrupt from his debts in bankruptcy be denied.

/s/ PAUL W. SAMPSELL,
Trustee in Bankruptcy.

CRAIG, WELLER &
LAUGHARN,

By /s/ THOMAS S. TOBIN,
Attorneys for Trustee.

[Endorsed]: Filed July 8, 1949. [6]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON OPPOSITION TO DISCHARGE

The Trustee having filed specifications of objection to discharge of bankrupt, and the same having been set for hearing before the undersigned Referee in Bankruptcy at his courtroom in the Federal Building, Los Angeles, California, for April 8, 1949,

at 10:00 A.M. on said date, and the Trustee appearing by his attorneys, Messrs. Craig, Weller & Laugharn, Thomas S. Tobin, of counsel, and the bankrupt appearing in person and by his attorney, Daniel S. Malamed, and some testimony having been taken and the matter having been thereafter continued to May 10, 1949, and a stipulation having been entered into on May 11, 1949, for the taking of the deposition of a witness, I. Goldberg, and thereafter the bankrupt having employed Messrs. Quittner, Stutman & Shutan as additional counsel, and motions to strike the specifications of objection to the discharge of bankrupt having been made by them, and amended specifications of objection having been filed by counsel for the trustee, and trial of said opposition to the discharge of [7] the bankrupt having been resumed on September 9, 1949, and briefs having been prepared on behalf of both the trustee and the bankrupt, and the matter having been thoroughly argued by counsel and the Referee being fully advised in the premises, now makes and enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

The Referee finds that on or about July 26, 1948, the bankrupt, Jack Mau, was indebted to Walbrooke Clothes, Inc., of Trenton, New Jersey, in the sum of \$730.92, which amount was due the said Walbrooke Clothes, Inc., on open account and which

was past due; that Walbrooke Clothes, Inc., had written the bankrupt demanding payment of said obligation, had called the attention of its local representative, Ellis Wishnow, to said delinquent account and was prepared to place said delinquent account in the hands of an attorney or a collection agency or a credit insurance company for pressure for immediate payment thereof.

That on or about July 26, 1948, for the purpose of inducing Walbrooke Clothes, Inc., from refraining from pressing said account for immediate payment or collection, the bankrupt, Jack Mau, first informed Ellis Wishnow, local representative of Walbrooke Clothes, Inc., upon the said Ellis Wishnow making a personal call on said bankrupt in an endeavor to collect said account, that he, the said bankrupt, had coming out of an escrow to him, the said bankrupt, the sum of \$12,500.00 in cash which was to be released to him as soon as he could get a court order; that at the time of said conference with the said Ellis Wishnow, the bankrupt prepared in his own handwriting a letter direct to Walbrooke Clothes, Inc., informing it that he had the sum of \$12,500.00 in escrow which was to be released to him as soon as he could get a court order, and requested said Walbrooke Clothes, Inc., to be patient with him and give him a further extension of time. [8]

That upon receipt of said statement in writing signed by the bankrupt and delivered to I. Goldberg, Credit Manager for Walbrooke Clothes, Inc.,

at Trenton, New Jersey, the said I. Goldberg, believing said statement to be true, and believing that the bankrupt had the sum of \$12,500.00 coming to him out of an escrow out of which would be paid the obligation then and there owing to Walbrooke Clothes, Inc., refrained from placing said account against said bankrupt held by the said Walbrooke Clothes, Inc., for collection, refrained from suing on the same or pressing the same further in any manner whatsoever until it became necessary for the said Walbrooke Clothes, Inc., to file its claim in this bankruptcy proceeding as a result of the bankrupt's ensuing bankruptcy.

That said statement was false and untrue and was known by the bankrupt to be false and untrue in that the bankrupt did not have coming to him the sum of \$12,500.00 out of escrow; that no escrow had ever been opened providing for a distribution to the bankrupt of \$12,500.00 which would be available to pay the claim of Walbrooke Clothes, Inc., and that at the time of making said statement in writing to Walbrooke Clothes, Inc., the bankrupt did not believe said false and untrue statements to be true.

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

Conclusions of Law

I.

The Court concludes that the bankrupt has been guilty of one of the acts specified in Section 14-c of the National Bankruptcy Act, and by reason

thereof should be denied his discharge, and that an order should be made accordingly.

Dated at Los Angeles in the Southern District of California, this 4th day of November, 1949.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

Disapproved as to Form Under Local District Rule.

/s/ JACK TENNER,
Attorneys for Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 4, 1949. [9]

[Title of District Court and Cause.]

ORDER DENYING DISCHARGE OF BANKRUPT

Specifications of objection to the discharge of the bankrupt having been filed by Paul W. Sampsell, Trustee in bankruptcy herein, and having duly come on for hearing pursuant to novice commencing April 8, 1948, and having been continued and adjourned a number of times, the bankrupt appearing in person and by his attorneys, Messrs. Quittner, Stutman & Shutan and Daniel S. Malamud, and the Trustee appearing by his attorneys, Messrs. Craig, Weller & Laugharn, Thomas S. Tobin of counsel, and the matter having been tried, argued and submitted, and the Referee having made findings of

fact and conclusions of law in favor of the Trustee and against the bankrupt, now on motion of Messrs. Craig, Weller & Laugharn, attorneys for the Trustee, Thomas S. Tobin of counsel, it is

Ordered that Amended Specification No. 1 filed by the Trustee be, and the same hereby is, sustained and the discharge of the bankrupt from his debts in bankruptcy be, and it hereby is, denied. [11]

Done at Los Angeles in the Southern District of California this 8th day of November, 1949.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed November 8, 1949. [12]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER BY JUDGE

To The Hon. Reuben G. Hunt, Referee in Bankruptcy:

The Petition of Jack Mau, Bankrupt herein, respectfully represents:

I.

That amended specifications of objections to the discharge of your Petitioner have been filed by Paul W. Sampsell, Trustee in Bankruptcy herein, and the same came on for hearing before this honorable Court, and the matter has been tried, argued and

submitted, and an Order has been entered denying the discharge of the Bankrupt on the 8th day of November, 1949: to wit:

“Specifications of objection to the discharge of the bankrupt having been filed by Paul W. Sampsell, Trustee in bankruptcy herein, and having duly come on for hearing pursuant to notice commencing April 8, 1948, and having been continued and adjourned a number of times, the bankrupt appearing in person and by his attorneys, Messrs. Quittner, Stutman & Shutan and Daniel S. Malamud, and the Trustee appearing by his attorneys, Messrs. Craig, Weller & Laugharn, attorneys for the Trustee, Thomas S. [13] Tobin of counsel, it is

Ordered that Amended Specification No. 1 filed by the Trustee be, and the same hereby is, sustained and the discharge of the bankrupt from his debts in bankruptcy be, and it hereby is, denied.”

II.

That the said Order denying the discharge of your Petitioner is erroneous for the following reasons:

(a) That the said Amended Specifications heretofore filed by the attorneys for the Trustee do not contain allegations sufficient to deny your Petitioner's discharge within the meaning of Section 14(c)3 of the National Bankruptcy Act in that the letter which your Petitioner sent to Walbrooke Clothes, Inc., is not a materially false statement in writing respecting your Petitioner's financial

condition and further that your Petitioner did not obtain an extension or renewal of credit within the meaning of Section 14 (c)3 of the Bankruptcy Act;

(b) That this Court granted the request of counsel for the Trustee, allowing him to retake a deposition after a motion to suppress the same had been sustained; that the said authority to the counsel for the Trustee was given over the objection of your petitioner's counsel and that this Court was without the authority to permit or to allow the attorney for the Trustee to retake said deposition;

(c) That the said evidence, introduced in the form of a deposition, should therefore be stricken from the record, and any inferences and conclusions drawn from the same should be disregarded;

(d) That this Court erroneously permitted the introduction of evidence in the form of a deposition over objections made by your Petitioner's counsel in the following particulars: [14]

(1) That Interrogatories 10, 11, 12, 14 and 15 were improper questions in that there was a lack of proper foundation and identification of the document referred to, and for the further reason that the use of secondary evidence in this particular was not permissible;

(2) That Interrogatory 16 called for hearsay without the introduction of the letters alleged to have been written to your Petitioner and as to what your Petitioner gave to Mr. Wishnow and the content of your Petitioner's reply and, further, as to

the information Mr. Wishnow gave Mr. Goldberg;

(3) That Interrogatory 17 called for hearsay without the introduction of the letter allegedly written to Mr. Wishnow and, further, what Mr. Wishnow advised Mr. Goldberg;

(4) That Interrogatories 18 and 19 called for conclusions from documents not properly identified and introduced;

(5) That Interrogatory 20 called for self-serving declarations and was based on document not properly identified and introduced;

(6) That Interrogatory 21 refers to Interrogatory 16, and the said answer to Interrogatory 16 called for hearsay without the introduction of letters allegedly written to your Petitioner and as to what your Petitioner advised Mr. Wishnow and the contents of Mr. Wishnow's reply and what Mr. Wishnow told Mr. Goldberg;

(7) That Interrogatory 22 called for hearsay;

(8) That Interrogatory 24 called for self-serving declarations and were based on letters not properly introduced or identified;

(e) That the Order is not supported by, and is contrary to the evidence in that the evidence did not sustain the burden of proof, to wit: that the statement allegedly made by the bankrupt was known to be false, made with a knowledge of its falsity and was intended to deceive and which, in fact, did deceive; that the evidence presented before

this Court indicated the following explanation for the utilization of the phrase, "12,500.00 in escrow":

Mr. Mau testified that he had been indebted to the Bank of America in the sum of \$7,500.00, which represented the first and second mortgage on his home, and that he was further indebted to the said Bank of America in the sum of \$4,000.00 on an unsecured promissory note; that he had made arrangements with Mr. Bean, the Vice-President of the Bank of America at the main office located in Los Angeles, whereby Mr. Mau and his wife were to execute a new first mortgage which would secure the indebtedness to the bank on the heretofore executed first and second mortgage, together with providing the bank with additional security on the unsecured promissory note in the sum of \$4,000.00; that the proposed mortgage would be in the sum of \$12,500.00; that there would be \$1,000.00 remaining for the bankrupt which he intended to use to pay this debt to Walbrooke Clothes, Inc.

Mr. Mau had been having matrimonial difficulties with his wife who refused to cooperate with this venture, and consequently the proposed escrow failed. That there was a pattern of matrimonial difficulties is apparent from the contents of the Exhibits submitted to the Court.

(f) That the foregoing evidence fails to support the fraudulent intent of your Petitioner within the meaning of Section 14(c)3 of the Bankruptcy Act.

(g) That the said Order is contrary to law and contrary to the evidence heretofore submitted in

support of the amended specifications in that the letter written by your petitioner is not a materially false statement in writing respecting your petitioner's financial condition within the meaning of Section 14(c)3 of the Bankruptcy Act, and further that your petitioner [16] did not obtain an extension or renewal of credit from Walbrooke Clothes, Inc., within the meaning of Section 14(c)3 of the Bankruptcy Act.

Wherefore, your Petitioner prays for a review of the said Order by the Judge and that the said Order be vacated and set aside.

/s/ JACK MAU,
Bankrupt, Petitioner.

QUITTNER, STUTMAN &
SHUTAN,

By /s/ JACK TENNER,
Attorneys for Petitioner. [17]

State of California,
County of Los Angeles—ss.

Jack Mau, being by me first duly sworn, deposes and says: that he is the Petitioner in the above entitled action; that he has read the foregoing Petition for Review of Referee's Order by Judge and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or

belief, and as to those matters that he believes it to be true.

/s/ JACK MAU.

Subscribed and sworn to before me this 16th day of November, 1949.

[Seal] /s/ JACK STUTMAN,
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 17, 1949. [18]

[Title of District Court and Cause.]

CERTIFICATE OF REFEREE ON REVIEW
OF ORDER DENYING THE BANKRUPT
A DISCHARGE

To the Honorable Peirson M. Hall, Judge of the
Above-Entitled Court:

The undersigned Referee in Bankruptcy presents to the Court his certificate on review of his order entered herein on November 8, 1949, denying the bankrupt a discharge.

Craig, Weller & Laugharn, Attorneys for Trustee.

Quittner, Stutman & Shutan and Daniel S. Malamud, Attorneys for Bankrupt.

I.

Statement of the Case

On February 25, 1949, the Trustee in Bankruptcy filed herein specifications of objection to the discharge of the bankrupt. On May 10, 1949, a hearing was had upon [20] said specifications. Evidence was received at such hearing. On June 29, 1949, the bankrupt filed herein his notice of motion and motion to strike such specifications. On July 8, 1949, with the permission of the Referee, the Trustee filed herein amended specifications of objection to the discharge of the bankrupt. On July 14, 1949, the bankrupt filed herein his notice of motion and motion to strike such amended specifications. On July 19, 1949, the deposition of Isidor Goldberg with reference to the opposition to the discharge was filed. On August 3, 1949, the bankrupt filed herein his motion for suppression of such deposition. Thereafter, and on September 9, 1949, a hearing was had upon such amended specifications and the said motions to strike and suppress the deposition. Evidence was received. The case was then submitted to the Referee for decision.

The Trustee presented to the Referee his proposed findings of fact and conclusions of law, pursuant to General Rule 7a of this court. On October 31, 1949, the bankrupt filed herein his objections to such proposed findings. On November 4, 1949, the Referee signed and filed herein his findings of fact and conclusions of law; and on November 8, 1949, signed

and filed herein his order denying a discharge to the bankrupt. On November 17, 1949, the bankrupt filed herein his petition for review of the said order by the Judge. On December 5, 1949, the reporter's transcript of the hearing on September 9 was filed herein. On December 28, 1949, the reporter's transcript of the proceedings on May 10, 1949, was filed herein.

II.

Statement of the Evidence

The reporter's transcripts of May 10 and [21] September 9, 1949, cover the proceedings on those dates and include the evidence taken, except the exhibits which are transmitted herewith. The facts are practically not in dispute. In brief, they are as follows:

The bankrupt was engaged in the business of custom tailoring in Los Angeles. On or about July 26, 1948, he was indebted to Walbrooke Clothes, Inc., a corporation, of Trenton, New Jersey, upon a general claim for goods sold on credit on or about April 22, 1948, in the sum of \$730.92. Shortly after July 26, 1948, he received a letter from such creditor, calling his attention to the fact that the bill was overdue and had not been paid. Soon after the receipt of such letter, the bankrupt wrote Mr. Isidor Goldberg, the credit manager of such creditor, on the back of said letter, as follows:

Mr. Goldberg

Dear Sir

I just got back today and saw Mr. Wisnow. I have been home 3 weeks with a nervous breakdown, lost 43 lbs.

My case as Mr. Wisnow nows was pospond for 3 weeks more. There is \$12,500 in Escrow to be released to me as soon as we get the court order.

Please be patient with me and I will streghten everthig with you so I can resume bussines in the fall so both of us can prosper. Things while I was gone where very bad.

Hoping to get a favorable reply to this Mr. Wollcott knows me for years and I am sure my reputain has been of the best This trouble will all be settled in a few weeks Thanging you in advance

I remain

Respfully yours,

JACK MAU. [22]

Mr. Ellis Wishnow was the creditor's sales representative in Los Angeles. The creditor had sent at least two letters to the bankrupt advising him that his account was overdue and that the creditor would be compelled to turn the account over for collection and suit if it was not paid. The bankrupt not only wrote Mr. Goldberg that he had this money in escrow but also told the same thing to Mr. Wishnow. Mr. Wishnow then advised Mr. Goldberg that the bankrupt had his money tied up in escrow but

that the creditor would be paid and not to press the bankrupt for money.

If the creditor had not been told directly by the bankrupt by this written statement that he had this \$12,500.00 in escrow to be released to him as soon as he could get a court order, it would not have granted any further time to the bankrupt for the payment of the account and would have turned the account over to the London Guaranty and Accident Company, with whom it held its credit insurance and which handled the creditor's collections, and that company would then have turned the same over to its attorneys for their attention. The creditor, in not taking action to collect the debt and in extending the credit further, relied upon the said written statement of the bankrupt and upon his oral representations to Mr. Wishnow to the same effect. The bankrupt admitted that he knew the statement to the creditor about the escrow was false but that he did not intend to mislead or deceive or defraud the creditor with such statement. He further testified that the real fact was that there was not any escrow at that time, but that it was contemplated at one time that an escrow would be opened and completed with respect to the sale of some property in which he was interested, out of which he would ultimately receive \$1,000.00, but that such [23] escrow was never created and the deal collapsed.

The motion to suppress the deposition was heard at the hearing on September 9, 1949. The principal

contention of the bankrupt with respect thereto was that the notary's certificate did not comply with Federal Rule 30f, in that the notary did not certify that the deposition was a true record of the testimony given by the witness. This matter was considered at the hearing on September 9, 1949. The Referee stated that if the trustee thought that the deposition was defective in any respect, he could take the deposition over again. This was objected to by the bankrupt upon the ground that if the deposition were suppressed, it could not be taken over again. Later on at the hearing, the bankrupt, through his counsel, stipulated that the deposition need not be taken over again and could be received in evidence, subject to his objection that it was insufficient in that it did not contain such a certification. In his petition for review, the bankrupt alleged that the motion to suppress the deposition was sustained. This is incorrect. The Referee made no order with respect to such motion, particularly since the bankrupt's counsel suffered it to be received in evidence, subject to his said objection thereto.

III.

Questions Presented

1. Was this false statement of the bankrupt regarding the escrow, knowingly and fraudulently made by the bankrupt with intent to deceive and relied upon by the creditor in extending credit?
2. Did the Referee have the power, if the motion

to suppress the deposition were granted, to permit the testimony [24] of Goldberg to be taken again by deposition?

3. Were the rulings by the Referee erroneous with reference to the admittance into evidence of the testimony alleged by the bankrupt to be hearsay?

4. Was the testimony given in the deposition of Goldberg, the credit manager of the creditor, with respect to the reliance by the creditor, in extending credit to the bankrupt, upon the written statement of the bankrupt that he had \$12,500.00 coming to him out of an escrow, self-serving and therefore inadmissible?

5. Where did the burden of proof lie after the Trustee had shown to the satisfaction of the Court that the bankrupt had committed an act condemned by Section 14a(2) of the Bankruptcy Act?

IV.

Comment on the Law

1. Section 14c(3) of the Bankruptcy Act provides that the Court may deny a discharge if the bankrupt “. . . obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition; . . .”. Such a statement must have been made knowingly and fraudulently, with intent to deceive; must have been material

relative to the bankrupt's assets and liabilities; and must have been relied upon by the creditor in order to constitute a sufficient ground of denying the discharge. In our case, the contention made by the bankrupt is that while the written statement he made to the creditor regarding the \$12,500.00 in escrow was false and the facts were otherwise, he did not make such statement with intent to defraud the creditor. Intent to [25] deceive, on the part of the bankrupt, not being susceptible of direct proof, will be regarded as established by reasonable and necessary inference from the facts of the case. The burden of showing, by a preponderance of evidence, countervailing or explanatory facts and circumstances sufficient to contravene the inference of intent to deceive, clearly rests upon the bankrupt. To permit bankrupts who admit the commission of acts forbidden by Section 14 of the Bankruptcy Act, to shield themselves from the penalties imposed, by merely interposing their own assertions of honest motives and innocent intent, uncorroborated by additional evidence, clear and convincing in character, would result in affording an easy method of frustrating the purposes of the law. One who, by his own admission, swore to a statement which he knew to be materially false would naturally be suspected of having the same slight regard for truth when the occasion demands of him a plausible explanation. In *re Monsch*, E. D., Ky., 34 ABR (NS) 116, 18 F. Supp. 913. See, also, in *re Rosenfield*, W. D., N. Y., 22 ABR (NS) 161,

1 F. Supp. 924; *Yates v. Boteler*, CCA 9, 163 F.(2) 953. The making of the statement mentioned in the statute means to recklessly make it, with no honest belief that it is true. In *re Weitzman*, N. D., Tex., 6 ABR (NE) 427. Whether or not a bankrupt fraudulently intended to falsify his financial statements in any particular for the purpose of obtaining credit is largely a question of fact. *Baash-Ross v. Stephens*, CCA 9, 27 ABR (NS) 591, 73 F.(2) 902. The fact that a false financial statement was made carelessly and with no bad intent and that the bankrupt, at the time of making the statement, believed that he would be able to repay his creditors, does not operate to prevent the statement from [26] barring his discharge. In *re Easthan*, S. D., Tex., 18 ABR (NS) 217, 51 F.(2) 287.

It thus appears, from the facts in this case and the cited cases, that the bankrupt committed the offense described in Section 14a(3) of the Bankruptcy Act and is, therefore, not entitled to a discharge.

2. The Referee knows of no rule, law or decision at least where it does not appear that anyone would be prejudiced or that a vested interest would be injured, to order a suppressed deposition taken over again to cure any defects therein. No showing was made here by the bankrupt that the retaking of the deposition would prejudice him in any way.

3. Even if the so-called "hearsay" testimony was erroneously admitted into evidence, such error

is harmless and non-prejudicial since the bankrupt himself, by his own testimony, corroborated such so-called "hearsay" testimony. Error, to be taken advantage of, must be prejudicial to the complaining party. An appellant may assign as error only such proceedings as injuriously affect him. *Allen v. Bay Cities*, 122 C. A. 590, 10 P.(2) 520; *Bank v. Cohen*, 21 C. A. (2) 510, 69 P.(2) 875.

4. Even though the testimony given by Goldberg in the deposition to the effect that the creditor relied upon the bankrupt's written statement respecting the escrow be, in a sense, self-serving, one of the necessary elements in establishing the commission by the bankrupt of the act prohibited by Section 14a(3) of the Bankruptcy Act is such reliance, and testimony of the creditor with respect thereto is competent. *In re Boomgaarden*, D. C., Minn., 9 ABR (NS) 233, 17 F.(2) 149; *In re Lundberg*, CCA 7, 48 ABR 41, 272 F. 107. Furthermore, the testimony given by Goldberg, the credit [27] manager of Walbrooke Clothes, Inc., to the effect that such creditor relied on the false statement in extending credit, is corroborated by the fact that thereafter the creditor refrained from suing upon the account. Under these circumstances, the admission into evidence of the statement of Goldberg in the deposition, that the creditor, his principal, relied upon the statement of the bankrupt about the \$12,500.00, does not constitute prejudicial error on which the bankrupt may rely upon review. *McCur-tain v. Guthrie*, 294 P. 133, 146 Okla. 144; *Johnson*

v. Tunstall, (Tex.), 25 S. W. (2) 828, rev'g. 13 S. W. (2) 240. At all events it would seem that such testimony would be prima facie evidence of reliance, and the burden would be on the bankrupt to show that the creditor did not rely upon the bankrupt's statement when it did forbear to sue the bankrupt to collect the unpaid account.

5. In presenting the evidence above summarized, the Trustee showed to the satisfaction of the Referee that there were reasonable grounds for believing that the bankrupt had committed one of the acts which would have prevented his discharge in bankruptcy under Section 14c(3) of the Bankruptcy Act. In Section 14c(7) of the Bankruptcy Act, it is provided that, where this situation appears, the burden of proving that he has not committed any such acts shall be upon the bankrupt.

V.

Findings of Fact and Conclusions of Law

The Referee's findings of fact and conclusions of law were filed herein, as above indicated, on November 4, 1949. [28]

VI.

Documents Accompanying This Certificate

The documents relative to the order of the Referee made on November 8, 1949, and which accompany this certificate, are as follows:

1. The documents referred to above under "Statement of the Case."

2. The one exhibit introduced into evidence.

3. Briefs filed by counsel with the Referee, specifically as follows:

- a. Brief of Trustee, filed September 17, 1949.
- b. Reply brief of bankrupt, filed October 7, 1949.
- c. Trustee's memorandum on opposition to discharge, filed October 19, 1949.

Dated: This 6th day of January, 1950.

Respectfully submitted,

/s/ REUBEN G. HUNT,

Referee in Bankruptcy.

[Endorsed]: Filed January 6, 1950. [29]

At a stated term, to wit: The February Term, A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Wednesday, the 15th day of February, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall, District Judge.

[Title of Cause.]

MINUTE ORDER AFFIRMING REFEREE

This matter having been submitted to the court on Petition for Review of the Referee's Order denying the discharge, the court, being fully advised, orders, that

“The Order of the Referee is affirmed.” [30]

In the District Court of the United States Southern
District of California Central Division

In Bankruptcy No. 46,674-PH

In the Matter of
JACK MAU,

Bankrupt.

ORDER AFFIRMING REFEREE'S ORDER

The petition for review of the order of Referee Reuben G. Hunt denying a discharge to the bank-

rupt herein, coming on for argument on January 23, 1950, the bankrupt and petitioner on review appearing by his attorneys, Quittner, Stutman & Shutan, Jack Tenner of counsel, and the Trustee appearing by his attorneys, Messrs. Craig, Weller & Laugharn, Thomas S. Tobin of counsel, and the review having been argued and submitted, and the Court having considered the same and having entered its Minute Order on February 15, 1950, now on motion of Messrs. Craig, Weller & Laugharn, attorneys for the Trustee, it is

Ordered that the findings of fact and conclusions of law of the Referee be, and they hereby are, adopted by the Court, and the order denying the bankrupt's discharge is affirmed.

Done at Los Angeles in the Southern District of California this 2nd day of March, 1950.

/s/ PEIRSON M. HALL,

United States District Judge.

Approved as to Form Under Rule.

/s/ JACK TENNER,

Attorneys for Bankrupt.

[Endorsed]: Filed and entered March 2, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Paul W. Sampsell, Trustee in Bankruptcy
Herein, and His Attorneys, Craig, Weller
& Laugharn:

Notice Is Hereby Given that Jack Mau, Bankrupt herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that Minute Order entered February 15, 1950, in Book Number 75, Page 261, wherein Honorable Peirson M. Hall, Judge of the above-entitled Court, affirmed the Order of Honorable Reuben G. Hunt, Referee in Bankruptcy, denying the discharge of the Bankrupt herein.

Dated: This 13th day of March, 1950.

QUITTNER, STUTMAN &
SHUTAN,

By /s/ FRANCIS F. QUITTNER,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 13, 1950. [32]

[Title of District Court and Cause.]

CORRECTED NOTICE OF APPEAL

To Paul W. Sampsell, Trustee in Bankruptcy
Herein, and To His Attorneys, Craig, Weller
& Laugharn:

Notice Is Hereby Given that Jack Mau, Bankrupt herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that Minute Order entered February 15, 1950, in Book Number 75, Page 261, wherein Honorable Peirson M. Hall, Judge of the above-entitled Court, affirmed the Order of Honorable Reuben G. Hunt, Referee in Bankruptcy, denying the discharge of the Bankrupt herein; and, further,

Notice Is Hereby Given that Jack Mau, Bankrupt herein, appeals to the United States Court of Appeals for the Ninth Circuit from that Order entered March 2, 1950, in Book Number 64, Page 713, signed by Honorable Peirson M. Hall, judge of the above-entitled Court, affirming Referee's Order Denying Discharge.

Dated: This 28th day of March, 1950.

QUITTNER, STUTMAN &
SHUTAN,

By /s/ FRANCIS F. QUITTNER,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 3, 1950. [34]

Los Angeles, California, Tuesday, May
10, 1949, 10:00 A.M.

The Referee: How about the Jack Mau matter?

Mr. Tobin: I want to put on just a little testimony in the Mau matter.

The Referee: All right. Go ahead.

Mr. Tobin: Mr. Wishnow.

ELLIS WISHNOW

called as a witness, being first duly sworn, testified as follows:

The Referee: State your name.

The Witness: Ellis Wishnow.

Examination

By Mr. Tobin:

Q. Mr. Wishnow, where do you live?

A. 4446 West 64th Street.

Q. What is your occupation?

A. Traveling salesman.

Q. Are you the local representative of Wallbrook Clothes, Inc.?

A. Yes.

Q. You are their local representative?

A. Yes.

Q. Do you know the bankrupt, Jack Mau?

A. Yes, I do.

Q. How long have you known him? [2*]

A. I have known Jack Mau, I would say, 13 or 14 years.

Q. Prior to July 26, 1948, was he indebted to your company?

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Ellis Wishnow.)

A. I believe at one time he was indebted to us. I am not positive, but he bought goods from us prior to that time, and that is why he was indebted to us.

Q. Showing you a letter dated July 26, 1948, directed to Jack Mau of Hollywood, and signed Wallbrook Clothes, Inc., by I. Goldberg, Credit Manager, I will ask you if that letter will refresh your recollection as to the amount Mau owed you at that time? A. Yes, it does.

Q. And was that the amount, so far as you know?

A. So far as I know, that is the amount.

Q. Had you called on Mau for payment of that indebtedness at any time prior to that date?

A. I don't believe so, prior to the date of that letter.

Q. When, if at any time, did you call on him for payment of that obligation?

A. I called on Jack Mau approximately three days after that letter was written, receiving a copy of the same.

Q. You had received a copy of it from your headquarters? A. That's right. [3]

Q. And at the time you called on Mr. Mau about three days after the date of this letter, did you have a conversation with him? A. Yes, I did.

Q. Where did that conversation take place?

A. In the store.

Q. Who was present?

A. Jack Mau, and I believe the tailor and salesman.

(Testimony of Ellis Wishnow.)

Q. And yourself? A. Yes.

Q. Will you give the Court the substance of the conversation that took place between you and Jack Mau?

A. I asked Jack when he expected to make the payment, and he told me at the time that he was sick for quite a while, and it cost a lot of money, and that he had \$12,500, I believe, in escrow, and he expected it out within two or three weeks, and when it came through he would pay us our money.

Q. Did you make the suggestion to him that he write those facts to your headquarters?

A. Yes, I told him to explain it to them, so they would know that.

Q. Showing you the back of this letter of July 26th, directed to Jack Mau of Hollywood, signed Wallbrook Clothes, Inc., and calling your attention particularly to the handwriting on the back, are you familiar with Jack Mau's [4] handwriting?

A. No, I am not.

Q. Do you know his signature?

A. No, I don't.

Q. You wouldn't know it? A. No.

Q. In any event, did you make recommendations of any kind to your company with regard to not pressing Mau for the time being in connection with this?

A. I told them Jack would probably pay it, because he told me he would.

The Referee: May I see that, please?

(Testimony of Ellis Wishnow.)

Mr. Tobin: Yes, your Honor. I would like to offer it in evidence, if the Court please, as Trustee's Exhibit 1.

Mr. Malamed: I think I will object to it at this time, because at this time it hasn't been tied together with the bankrupt. There is no proof of his signature. I don't know that it is proper at this time. I think when the bankrupt is on the stand they will be able to ask the bankrupt and get it in in that way.

The Referee: Did you prepare the schedules?

Mr. Malamed: Yes, your Honor.

The Referee: And he signed them?

Mr. Malamed: Yes, sir.

The Referee: Do you contend that this signature is not his signature? [5]

Mr. Malamed: I wouldn't contend that it is not his signature. I said I don't know.

The Referee: What is your point? Have you seen this?

Mr. Malamed: I don't want to make it difficult here.

Mr. Tobin: I will ask to have it marked as Trustee's Exhibit 1 for identification, and then, as Trustee's Exhibit No. 2, for the purpose of laying a foundation for the introduction of Exhibit 1 for identification, I would like to offer in evidence page 4 of the transcript of the examination of the bankrupt, which occurred in this court on February 2, 1949, at 2 p.m., in response to questions asked by Mr. Samuel Miller in regard to that same letter.

(Testimony of Ellis Wishnow.)

Mr. Malamed: If your Honor please, I will withdraw my objection to the letter being introduced in evidence.

The Referee: Have you seen this?

Mr. Malamed: I saw the transcript.

The Referee: Have you read this? Show it to him.

(Mr. Tobin handed transcript to the witness.)

Mr. Malamed: I withdraw my objection, your Honor.

The Referee: I am going to overrule the objection, if you want to put it in evidence.

Mr. Tobin: I will, yes.

The Referee: The Court has the power, under the law and the decisions, to compare a signature with previous signatures of the same party in the same proceeding, and I [6] have just looked over Jack Mau's signatures to his schedules in this bankruptcy, and his statement of affairs, and the Court rules that it is Jack Mau's signature. Furthermore, his evidence identifies this particular letter, so I will overrule the objection and receive it in evidence.

EXHIBIT NO. 1

Mr. Goldberg

Dear Sir

I just got back today and saw Mr. Wisnow. I have been home 3 weeks with a nervous breakdown, lost 43 lbs.

(Testimony of Ellis Wishnow.)

My case as Mr. Wisnow nows was pospond for 3 weeks more. There is \$12,500 in Escrow to be released to me as soon as we get the court order.

Please be patient with me and I will strengthen everythig with you so I can resume bussines in the fall so both of us can prosper. Things while I was gone were very bad.

Hoping to get a favorable reply to this Mr. Wollcott knows me for years and I am sure my reputain has been of the best. This trouble will all be settled in a few weeks. Thanging you in advance

I remain

Respfuly yours,

JACK MAU.

Q. (By Mr. Tobin): Did you believe, at the time you made your recommendations to the company, that Jack Mau had \$12,500 coming from an escrow?

A. At the time of this letter——

Q. (By Mr. Tobin): Did you believe that he was telling the truth?

A. Yes, I believed he was telling the truth.

Q. If you had known that the statements contained in Trustee's Exhibit No. 1 were not true, would you have recommended to your company that they give him further time?

A. No, I wouldn't.

Q. How long prior to the date of Exhibit No. 1, that is, July 26th, approximately how long had your

(Testimony of Ellis Wishnow.)

company been pressing Jack Mau for payment of this obligation?

A. According to the letter, the letter was dated July 26th, and the terms of the bill was net 60 days, and they claimed they were 30 days past due on July 26th, so it was probably the first time we put any pressure on at all.

The Referee: Mr. Tobin, what specification is that?

Mr. Tobin: Specification No. 4.

The Referee: I see. False statement in writing?

Mr. Tobin: Yes, your Honor.

The Referee: All right.

Q. (By Mr. Tobin): I believe you testified that you recommended that he be given more time?

A. Yes, I believe I did.

Mr. Tobin: That is all.

The Referee: You believe you testified, or did you say that?

A. At the time Mr. Mau told me he had this money coming, I wrote my company and told them about it, and, in response to that, I believe they gave him more time.

Mr. Samuel Miller: May I be excused, your Honor?

The Referee: Yes.

(Testimony of Ellis Wishnow.)

Examination

By Mr. Malamed:

Q. You say you have known Mr. Mau for a very long period of time?

A. That's right.

Q. And you represented other companies, too?

A. The same firm.

Q. A number of years? A. Yes.

Q. You had been doing business with him, for that firm, for all these years?

A. No. Jack worked for someone else before he had that place, and I knew him there. [8]

Q. How long had he had this place, do you know?

A. I am not sure, but I imagine that was 1944 or 1945.

Q. A number of years? A. Yes.

Q. And during that time had he been purchasing from your company through you?

A. I believe we sold Mr. Mau one or two bills before that time, I would say about six to nine months before this came up.

Q. Now, before you received a copy of this letter in the mail, you hadn't been asked to press him for any payment of seven hundred and some odd dollars due the company?

A. I don't believe so. I don't believe I had been.

Q. But this was actually the first contact that was made for collection of this past due debt?

A. As far as I can remember.

(Testimony of Ellis Wishnow.)

Q. Isn't it a fact that you came to talk to Mr. Mau after you received that letter, and you explained to him or told him that you knew about his circumstances, you knew that he had been losing money at that time, did you not?

A. I knew that Mr. Mau was sick. I could see that he had lost 30 or 40 pounds, and he told me it had cost him a lot of money.

Q. Isn't it a fact that you told Mr. Mau that you weren't worried about him from a credit standpoint, that you [9] felt that he would pay this bill?

A. Yes, that's right.

Q. Did you also suggest to him that he write something to the credit manager to indicate his good faith, not to ignore this letter, but to let him know something was going to be done?

A. That's right.

Q. Did you also suggest to him that he try to send some money within the next couple of weeks?

A. Yes.

Q. Did you discuss anything further with Mr. Mau as to what he might possibly write in a letter?

A. I told him to write to them the things he told me.

Q. Did he at that time tell you anything about the \$12,500?

A. First he told me he had money in escrow.

Q. Did he tell you how much money?

A. I am not sure of the exact amount; I wouldn't say.

(Testimony of Ellis Wishnow.)

Q. Did he tell you what kind of an escrow?

A. I believe it was a house, but I am not sure.

Q. In other words, he was supposed to get some money from his house?

A. I believe so. I am not sure whether the money was from a house, but there was money involved.

The Referee: In escrow?

The Witness: And when that came through he would send the money.

Q. (By Mr. Malamed): In the case of a bad debt, do you have anything to do with the collection of it?

A. No. Sometimes I suggest that I call on the account and see what I can do. It is usually handled from the Credit Department.

Q. In this particular case did you have any specific instructions as to what you were to do?

A. No.

Q. When you received a copy of this letter of July 26th, was there any other communication sent to you?

A. Not that I can recall.

Q. So it was just the first warning, so to speak, and, as a result, you went to see the debtor, and you had no instructions as to any further proceedings?

A. That's right.

Q. What if the man had told you, "I don't intend to pay," or "I can't pay"?

A. I would tell the company, and it was up to them.

Q. You would report back whatever the conversation was?

(Testimony of Ellis Wishnow.)

A. I would report back, yes.

Q. Would it be up to you to make a recommendation to the company as to what proceedings to take?

A. Pardon?

Q. Would it be up to you to make a recommendation to the company?

The Referee: Ask him why he didn't make a recommendation.

Mr. Malamed: There are two things there, if your Honor please, one, that if the man had not told him the story, he would have recommended differently than he did, and, having told him the story, he did what he did.

The Referee: If he said he had no money coming, or something like that, this gentleman would write back and tell them he was against it, but when he said he had \$12,500 coming to him, they naturally delayed action, just like you and I would. Don't let me throw you off the track.

Q. (By Mr. Malamed): Was there anything in your conversation with Mr. Mau concerning the money coming out of escrow that you understood to be a created story, for the purpose of giving your credit manager something to keep him quiet for a while?

Mr. Tobin: I object to it as calling for a conclusion of the witness.

The Referee: Well, I think that objection is good. You are entitled to examine on the other examination.

(Testimony of Ellis Wishnow.)

Q. (By Mr. Malamed): Well, did you honestly believe that there was money coming out of an escrow to Mr. Mau?

The Referee: What difference does it make? [12]

Mr. Tobin: I think that would be competent, your Honor, if he believed it to be true, on the question of reliance.

The Referee: Wait a minute. Maybe I am wrong there.

Mr. Tobin: I think that is competent, on the matter of his belief.

Q. (By Mr. Malamed): Did you honestly believe he had this money coming out of the escrow?

A. Yes, I did. He told me so, and I naturally believed him.

Q. When did you see Mr. Mau again, after this letter was written?

The Referee: How long are you going to take, counsel?

Mr. Malamed: Not very long.

The Referee: We will recess for 10 minutes.

(Ten-minute recess.)

The Referee: Proceed. Go ahead, counsel.

Q. (By Mr. Malamed): Mr. Wishnow, you testified that you spoke to Mr. Mau about writing a letter. To your knowledge, was any extension of time granted to Mr. Mau for the payment of the debt, as a result of any conversation he had with you or any letter he wrote?

(Testimony of Ellis Wishnow.)

A. I think on account of a letter he wrote an extension was given him.

Q. Was anything done, either verbally or in writing?

A. I don't believe so. [13]

Q. And you don't know what sort of action would have been taken if he hadn't written any sort of letter? You had no instructions on that?

A. No, not myself, no.

Mr. Malamed: I think that is all.

Examination

By Mr. Tobin:

Q. Do you know what the policy of your company would have been if the debtor didn't pay a bill of that kind?

A. They probably would have given him a little bit more time, and if he didn't pay or show any inclination to pay, usually they would turn it over to the insurance company, that is, the Guaranty Insurance Company.

The Referee: The insurance company guaranteed the account? A. Yes, I believe so.

Mr. Tobin: That is all.

Mr. Malamed: That is all.

Mr. Wishnow: The right of subrogation follows. That is all.

Mr. Tobin: That is all. If your Honor please, counsel wanted a continuance in this matter, and I told him the other day I would consent to it. I

imagine, possibly, in the meantime, however, it might be well to take the deposition of this credit manager, Mr. Goldberg.

The Referee: Yes, because he would be the one to [14] state whether or not the company relied on this and granted an extension, and whether they would have granted it without this statement.

Mr. Tobin: I don't want to subject the bankrupt to unnecessary expense. If counsel wants to stipulate that the deposition may be taken on written interrogatories, I will prepare such interrogatories and submit them to him, and he can submit counter-interrogatories, if he wishes, and we can send them the stipulation, and they may be filled out before any Notary Public.

Mr. Malamed: I think so.

Mr. Tobin: In that case, I will prepare the written interrogatories.

The Referee: How long shall we continue it?

Mr. Tobin: How long do you want, counsel?

The Referee: You would need at least 30 days, wouldn't you?

Mr. Tobin: At least.

Mr. Malamed: Do you want to make it about six weeks?

Mr. Tobin: When can your Honor set it? How about Thursday, June 23rd?

The Referee: That is a busy day.

Mr. Tobin: How about Tuesday, the 21st? How does that sound?

The Referee: Do you think that will give you enough time? [15]

Mr. Tobin: Yes. We will get them out. May we have a photostatic copy, either that, or, if counsel wants to stipulate that we can read in his deposition the contents of Exhibit No. 1, on both sides——

Mr. Malamed: I think you already have that in the record somewhere, counsel, and I so stipulate.

Mr. Tobin: There is no objection on the ground that it is not the best evidence? That is the only thing I have in mind. Otherwise we would have to get photostatic copies of Exhibit No. 1 to be sent back with the deposition.

Mr. Malamed: I will let him present it any way he wishes. If you want to make photostats, all right.

Mr. Tobin: I think probably that is the best way, to have photostats made.

The Referee: Be sure that counsel gets one of the photostats.

Mr. Tobin: Yes, your Honor.

The Referee: Be sure and get that exhibit back to the Court.

Mr. Tobin: Yes, your Honor.

The Referee: All right, then. This matter is continued to June 21st. Do you want it at 10 o'clock or 2 o'clock?

Mr. Tobin: I imagine 10 o'clock, your Honor, because the day lasts longer then.

Mr. Malamed: That is Tuesday?

Mr. Tobin: Yes.

[Endorsed]: Filed Dec. 28, 1949.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy, No: 46,674-PH

In the Matter of
JACK MAU,

Bankrupt.

Before the Honorable Reuben G. Hunt, Referee
in Bankruptcy.

REPORTER'S TRANSCRIPT OF PROCEED-
INGS ON HEARING ON AMENDED
OBJECTIONS TO BANKRUPT'S DIS-
CHARGE, ON FRIDAY, SEPTEMBER 9,
1949, AT 10 A.M.

APPEARANCES

For the Trustee:

CRAIG, WELLER & LAUGHARN, By
THOMAS S. TOBIN, Esq.

For the Bankrupt:

QUITTNER, STUTMAN & SHUTAN By
JACK TENNER, Esq., and
FRANCIS F. QUITTNER, Esq.

Friday, September 9, 1949. 10:00 A.M.

The Referee: Go ahead with the Mau matter.

Mr. Quittner: If your Honor please, there has
been on file with the Court a motion to suppress
the deposition.

The Referee: Is that something new?

Mr. Quittner: No. It has been on file for some time. Mr. Tobin has notice of the motion, and it was set, as per an agreement between counsel, to have been heard at the last time that the matter came up for hearing, and Mr. Weller called on that morning, telling us that Mr. Tobin would be out of town, could we set it, the entire procedure, over until today.

It is my suggestion to the Court, with the Court's permission, of course, that the motion to suppress the deposition be heard before we get into other matters, because I think an adjudication as to whether or not the deposition may, in the first instance, be presented to the Court may be very material and may perhaps save a great deal of time.

The Referee: Wait a moment. I see here on August 3, 1949, a motion to—a notice of motion to suppress deposition. I don't find any grounds stated in the notice in support of the motion. What are they?

Mr. Quittner: There is a notice of motion, and accompanying that is a motion. [2*]

The Referee: Your notice of motion should state upon what grounds it is made.

Mr. Quittner: I did, your Honor—

The Referee: I know, but on the face it doesn't so state. You should state it there.

Mr. Quittner: It is not on the notice of motion. I filed a separate document called a motion, in which I state the grounds.

* Page numbering appearing at top of page of original Reporter's Transcript.

The Referee: I know. When you file a notice of motion you also give the grounds on which you proceed. How about that, Mr. Tobin?

Mr. Tobin: That deposition was taken pursuant to stipulation, which was entered into May, 1949, between former counsel for the bankrupt and myself. The stipulation reads: "It is hereby stipulated——"

The Referee: Is that stipulation on file?

Mr. Tobin: It should be.

The Referee: Let us find that. Are you familiar with that?

Mr. Shutan: We have a copy of the stipulation.

The Referee: What is wrong with the stipulation?

Mr. Quittner: Your Honor, I find nothing wrong with the stipulation, except the stipulation does not waive the procedure under the Federal Rules.

The Referee: That isn't my point. Just let me get the stipulation. [3]

Mr. Quittner: I have it here, your Honor. It might save time.

The Referee: Wait until I get the original.

Mr. Tobin: The original stipulation may be attached to the deposition.

The Referee: Have I got the deposition?

Mr. Tobin: It should be here.

The Referee: No, it isn't here. You had better ask the outer office to find it.

Mr. Tobin: We have a copy of it. That was sent back to us.

The Referee: You might step in, Mr. Tobin, and get it. Wait a minute, Mr. Tobin. Here it is. Wait a second. Maybe I am wrong. Here is the deposition. The stipulation should be on file, shouldn't it?

Mr. Quittner: We will stipulate that a copy may be deemed the original, your Honor.

The Referee: Let me see if I can find it. I don't find it here.

Mr. Quittner: If your Honor please, we will stipulate that this copy of the stipulation we have may be deemed as the original, for the purposes of this hearing.

Mr. Tobin: I will accept the stipulation. I have some extra copies of the same thing.

Mr. Quittner: If we could have one, too, in this hearing—— [4]

(Document passed to counsel by Mr. Tobin.)

The Referee: Could I have one that isn't torn?

Mr. Tobin: Yes (handing document to the Referee.)

The Referee: What is the date of it? Do you know?

Mr. Quittner: The 11th day of May, 1949.

The Referee: Well, what is wrong with the stipulation?

Mr. Quittner: If your Honor please, we find there is nothing wrong with it, except that the stipulation does not, by its terms, waive Rule 30-F and Rule 31-B and 32-D.

The Referee: What rules are those?

Mr. Quittner: Rule 30-F(1); Rule 31-B——

The Referee: Now, take one at a time. 31-F(1): (Reading) "The officer shall certify upon the deposition that the witness was duly sworn by him——"

Does the deposition state that or not?

Mr. Quittner: It does not, your Honor.

Mr. Tobin: Well, let's see.

Mr. Quittner: Yes. I beg your pardon. It does.

The Referee: (Reading) "I. Goldberg, being first duly sworn by the Notary Public——"

What is wrong with that?

Mr. Quittner: Nothing wrong with that part, your Honor.

The Referee: Then it was certified that the witness was sworn. [5]

Mr. Quittner: There is no statement that the deposition is a true record of the testimony given by the witness, which is a requirement under that section, which provides that it must state on the face of the deposition that this was done.

The Referee: You mean there is no notarization?

Mr. Quittner: There is a notarization on the end, merely saying, "Subscribed and sworn to before me——" But Rule 30-F(1) states that the officer shall certify upon the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness.

The Referee: How about that, Mr. Tobin?

Mr. Quittner: There is a further rule on written interrogatories, if your Honor please——

The Referee: What rule is that?

Mr. Tobin: I think it is 32.

Mr. Quittner: If I may call your Honor's attention to 31, which is the rule for written interrogatories, I think that is the one you meant.

Mr. Tobin: Yes.

The Referee: Wait a moment. I am listening to Mr. Tobin now. Rule 32: "Effect of Errors and Irregularities in Depositions. (a) As to Notice. All errors and irregularities in the notice for taking depositions are waived, unless written objection is promptly served upon the party [6] giving the notice."

We don't care about that.

Subdivision (c): "As to taking out deposition."

Now, then, will you refer, Mr. Tobin, to Rule 32, Subdivision (d)? I will read that: "As to completion and return of deposition." I think that would cover it.

"Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained."

Now, then this deposition was filed July 19, 1949. Today it is September 9th. Wait a moment. When did you file your motion? You filed your motion to suppress on August 3, 1949. What about that, Mr. Tobin?

Mr. Tobin: I don't think there is any irregularity there. In the first place, there was a stipulation to take this deposition upon the written interrogatories. Written interrogatories were sent back, and the answers were filled in before a notary public and sworn to. And the deposition is O.K.

The Referee: Well, now, wait a moment. What is that Rule you spoke of, Mr. Tenner? [7]

Mr. Tenner: 31, your Honor. That is the rule for the "Depositions of Witnesses Upon Written Interrogatories."

The Referee: But the rule you called my attention to was 30-F(1), isn't it?

Mr. Tenner: Yes, 30-F(1), but 30-F(1) is under a section which deals with depositions upon oral examination. However, Rule 31(b), which deals with the written interrogatories, incorporates Rule 30(c) (e) and (f), which is the only reason I am now using——

The Referee: Now, wait a moment. Where does 31-B incorporate Rule (c) and (f)—I mean 30(b) incorporate Rules——

Mr. Tenner: 30(f). 31(b) does that, your Honor.

The Referee: 31(b) does that?

Mr. Tobin: Yes, sir.

The Referee: What about that, Mr. Tobin. Have you examined these rules?

The Referee: 31(b) says: "A copy of the notice and copies of all interrogatories shall be delivered by the party taking the deposition to the

officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c) (e) and (f).”

We are concerned with (f): “To take the testimony of the witness in response to the interrogatories and to prepare, certify, file, or mail, attaching thereto a copy [8] of the notice and the interrogatories received by him.”

Mr. Tobin: There was no notice, if your Honor please; there was a stipulation.

The Referee: But I mean Rule 30(f) requires a certain certification that doesn’t appear on here.

Mr. Tobin: “Subscribed and sworn to before me——”

The Referee: That is no certification, beyond this: It says on the certificate this, that the witness was duly sworn by him. Well, I guess the “Subscribed and sworn to” is enough.

“That the deposition is a true record of the testimony given by the witness.” Where is that?

Mr. Tobin: Well, if the witness writes the answers in——

The Referee: That wouldn’t do. The officer has to certify.

Mr. Tobin: Well, I think this last paragraph of the stipulation, alone, would constitute a waiver.

The Referee: Wait until I get that, the stipulation.

Mr. Tobin: The last two paragraphs: “Said interrogatories, cross-interrogatories, redirect interrogatories, and recross-interrogatories to be sub-

mitted by counsel proposing them to opposing counsel prior to their being forwarded for answer.”

The Referee: Wait a moment. I don't read it the way you do. [9]

Mr. Tobin: I said next to the last paragraph. “Said interrogatories, cross-interrogatories, redirect interrogatories, and recross-interrogatories to be submitted by counsel proposing them to opposing counsel prior to their being forwarded for answer.”

The Referee: That doesn't cover it. I am talking about the certification by the officer, “That the deposition is a true record of the testimony given by the witness.”

Mr. Tobin: They also stipulated that the deposition “may be read in evidence in connection with the opposition to the bankrupt's discharge——”

The Referee: But it says the officer must certify to it. I am inclined to think the motion will have to be granted, and I will give you time to get another deposition.

Mr. Tobin: I guess that is what we will have to do.

The Referee: All right. The motion is granted. How far will we take this case over to get another deposition?

Mr. Tobin: It will have to be another month.

Mr. Tenner: If your Honor please, I would like as of this time to object to another continuance for the reason——

The Referee: I don't care to hear you. I will not permit technicalities to control. I will give him

a month to do it. We are not going to run this court on pure technicalities.

Let's see, what date would that be? [10]

Mr. Quittner: We may want to waive our motion to suppress and go to trial this afternoon.

The Referee: Do you want to do it now?

Mr. Quittner: Yes. Will the Court give me a moment to think about——

The Referee: I will give you several moments. We will recess for 10 minutes.

(Recess.)

The Referee: Let us go ahead.

Mr. Quittner: For the purpose of saving time, but for the purpose of reserving our question of law here, I am willing to do this: That we will stipulate that the deposition now before the Court is a retaken deposition, which has complied with all the rules concerning certificates, reserving, of course, my right, if this matter should have to go further, on the question of the retaking of the deposition, as the matter has been set for trial and is on trial.

Mr. Tobin: It is stipulated that it was taken pursuant to a signed stipulation by Daniel S. Malamud, with the same terms and conditions as the original stipulation, and that such a stipulation exists.

Mr. Quittner: Yes. We have already stipulated that the stipulation exists.

Mr. Tobin: All right.

Mr. Quittner: Then I think our record is in

shape. [11] We reserve the right to object to individual questions upon the rules of evidence, of course.

The Referee: All right. Isn't there some rule that objections to form will not be entertained by the Court unless they are made during the deposition?

Mr. Quittner: That is right. Our objections will be to the merits upon the usual rules of evidence, irrelevancy, immateriality, secondary evidence, things like that.

Mr. Tobin: I will now read the deposition of I. Goldberg, taken before——

Mr. Quittner: You don't need to incorporate it in the record. You are familiar with it?

The Referee: I will read it.

Mr. Tenner: If your Honor please, I intend to make certain objections. Would your Honor wait until you are through? Would you rather I do it after your Honor has read them?

The Referee: No. We will let Mr. Tobin read the questions and give you an opportunity to object on the merits.

Mr. Tobin: I would like to read the deposition, if I may, read it sitting.

The Referee: Yes. Go ahead.

Mr. Tobin: (Reading)

“DEPOSITION OF I. GOLDBERG

“taken before Ruth D. Budson, a Notary Public in New Jersey, on July 8, 1949. [12]

“State of New Jersey,
County of Mercer—ss.

“I. Goldberg, being first duly sworn by the Notary Public, whose name and jurat are hereinafter appended, pursuant to stipulation, entered into between the Trustee and the Bankrupt, and having been sworn as a witness for the Trustee, testify as follows:

“Direct Examination

“Questions Propounded by Mr. Tobin:

“Interrogatory No. 1: State your name?

“A. Isidor Goldberg.

“Interrogatory No. 2: Where do you live?

“A. 113 Lee Avenue, Trenton, New Jersey.

“Interrogatory No. 3: What is your occupation?

“A. Credit manager of Walbrooke Clothes, Incorporated.

“Interrogatory No. 4: Did you occupy the position of credit manager for Walbrooke Clothes, Incorporated, on July 26, 1948? A. Yes.

“Interrogatory No. 5: How long prior to that date did you occupy that position?

“A. Seven years.

“Interrogatory No. 6: Do you know if your company, Walbrooke Clothes, Inc., had any business transactions with the bankrupt, Jack Mau,

d/b/a Jack Mau of Hollywood, during the year 1948? A. Yes. [13]

“Interrogatory No. 7: Directing your attention to the date of April 22, 1948, did your company, Walbrooke Clothes, Inc., sell Jack Mau any merchandise as of that date on credit? A. Yes.

“Interrogatory No. 8: If so, what was the amount? A. \$730.92.

“Interrogatory No. 9: If so, when was payment due on the merchandise?

“A. July 21, 1948.

“Interrogatory No. 10: Calling your attention to a photostatic copy of a letter on the stationery of Walbrooke Clothes, Inc., dated July 26, 1948, directed to Jack Mau of Hollywood and marked as Trustee's Exhibit No. 1, I will ask you to examine the signature on the face of that letter and advise us if that is your signature. A. Yes.”

Mr. Quittner: Well, we have to object to that question. It calls for the identification of a signature on a photostatic copy, and it is our contention, under the rules of evidence, that the only way that such a document can be introduced for identification or for any other purpose would be for the identification of the original document, except, under the rules of the California Civil Code of Procedure, where the original document is not in existence.

The Referee: Where is the original document?

Mr. Tobin: It is here in court, turned over to us

to have photostatic copies made. It is in evidence.

The Referee: Compare the signatures.

Mr. Quittner: If your Honor please——

The Referee: Never mind. The Court has a perfect right, under the applicable rules, to determine whether or not the signature is genuine, whose it is, by comparing the signature on one document with some other document filed in the case.

Mr. Tobin: It was the Court's own suggestion that this original was taken and photostated, and the photostats used in connection with the deposition. The Court suggested that, himself (handing document to the Referee.)

The Referee: Where is the photostat?

Mr. Tobin: It is attached to the deposition.

The Referee: Now, this original document was received as Trustee's Exhibit No. 1 on May 10, 1949. Where did the Trustee get this from?

Mr. Tobin: The Court gave it to me and requested me to have it photostated.

The Referee: Where did I get it from?

Mr. Tobin: The Court has practically tried this case. It is practically finished.

The Referee: Who produced this document?

Mr. Tobin: We did.

The Referee: Where did you get it from? [15]

Mr. Tobin: From the bankrupt's records—from Walbrooke Clothes. The answer is written on the back.

The Referee: I see. The back of this document contains a written statement signed by Jack Mau. Is Mr. Mau here?

Mr. Quittner: Yes, your Honor.

The Referee: Come forward, please.

JACK MAU

called as a witness, having been previous duly sworn, upon being recalled, testified further as follows:

The Referee: You have been sworn, I think, in this matter?

The Witness: Yes.

The Referee: Will you please look at—just sit down, Mr. Mau. Will you please look at Trustee's Exhibit No. 1, filed here May 10, 1949, and look on the back of that and tell me whether the writing there is your handwriting?

The Witness: Yes, it is.

The Referee: And is the signature yours?

The Witness: That is right.

The Referee: Now, comparing that with the photostatic copy, I see that the face of the photostat—no. Comparing the face of this exhibit, which is a letter to Mr. Mau, signed by Walbrooke Clothes, Inc.—what is this man's name? [16]

Mr. Tobin: Goldberg.

The Referee: I. Goldberg, Credit Manager. That signature is the same as the signature on the photostat. So, the objection is overruled.

Mr. Quittner: May I have the record show, your Honor, that there was no identification before this Court by Mr. Goldberg of his signature. If your Honor please, we are not saying that that is not

(Testimony of Jack Mau.)

Mr. Goldberg's signature, but there has been no identification of Mr. Goldberg's signature.

The Referee: Do you mean to contend now that this photostatic copy doesn't show it is a correct copy of Trustee's Exhibit No. 1?

Mr. Quittner: It may be, your Honor, but——

The Referee: Just answer it: Is it or is it not?

Mr. Quittner: Yes, sir, it is a copy, but the copy has never been properly introduced into evidence, because Mr. Goldberg——

The Referee: I can't help that. The point is that a photostatic copy was introduced. We have here a supplemental photostatic copy of the original document itself. It is immaterial whether it was introduced in the taking of the deposition, on the hearing here. It is quite evidence to the Court that the photostatic copy is a correct copy of the original.

Now, proceed. That is all, Mr. Mau.

(Witness excused.) [17]

Mr. Tobin: The question was objected to——

The Referee: What question was that?

Mr. Tobin: No. 10 (Reading): "Calling your attention to a photostatic copy of a letter on the stationery of Walbrooke Clothes, Inc., dated July 26, 1948, directed to Jack Mau of Hollywood and marked as Trustee's Exhibit No. 1, I will ask you to examine the signature on the face of that letter and advise us if that is your signature.

"A. Yes.

"Interrogatory No. 11: Was that letter (Trus-

tee's Exhibit No. 1) caused to be sent by you to the bankrupt, Jack Mau, in the usual course of business? A. Yes."

Mr. Quittner: May the record show before the answer that we make exactly the same objection as to the identification of the original letter.

The Referee: Now, wait a moment. You said: "Was that letter (Trustee's Exhibit No. 1) caused to be sent by you to the bankrupt, Jack Mau, in the usual course of business?"

You deny that it was sent in the usual course of business?

Mr. Quittner: I am not in a position to deny what Mr. Goldberg did with the letter, but our objection, if the Court is going to overrule it, was that Mr. Goldberg must identify the original letter that subsequently proved to be—— [18]

The Referee: That is just——

Mr. Quittner: If I may, I will quote from cases——

The Referee: Let us get down to the facts. That is super-technical. No court will consider that. That is argument.

Mr. Tobin: The original is in evidence. That is Exhibit 1. That is, we had the photostatic copy made to be sent back for the purpose of the deposition. The Court had already received that in evidence.

The Referee: I know that.

Mr. Tobin: The Court stands on it.

The Referee: The answer of the witness is, "I

sent this letter, Trustee's Exhibit No. 1, in the usual course of business." All right. Proceed.

Mr. Tobin (Reading):

"Interrogatory No. 12: Was a carbon copy of that letter sent to your Los Angeles representative, Ellis Wishnow? A. Yes."

Mr. Quittner: May the record show that we make the same objection to this question?

The Referee: What objection?

Mr. Quittner: The same thing, that the carbon copy of the letter is not proper evidence, that there is still no proper identification before this Court of the original letter. [19]

The Referee: That is ridiculous. Overruled.

Mr. Tobin: Just for the purposes——

The Referee: Wait a moment. The only thing the question asked for is whether a carbon copy of this letter, Trustee's Exhibit No. 1, which is in evidence here and which is exemplified by the photostatic copy, which is a correct copy, shown to the witness in the taking of the deposition was a carbon copy of that letter sent to the Los Angeles representative, and the answer is, "Yes."

That will stand.

Mr. Quittner: What about materiality?

The Referee: Do you want to make an objection on the ground that this is not material?

Mr. Quittner: Yes. The sending of a carbon copy would be hearsay, too, if your Honor please.

The Referee: He knows whether a carbon copy is sent.

Mr. Quittner: Wouldn't it be immaterial?

The Referee: No, no. Go ahead.

Mr. Tobin (Reading):

"Interrogatory No. 13: Calling your attention to a signature, photostated, written out in handwriting, on the back of Trustee's Exhibit No. 1, starting with 'Mr. Goldberg——' "

The Referee: Wait a moment. That is the one I called Mr. Mau's attention to?

Mr. Tobin: Yes.

The Court: Go ahead. [20]

Mr. Tobin (Reading): "'Mr. Goldberg. Dear Sir,' and signed 'I remain respectfully yours, Jack Mau,' I will ask you to state whether or not you received that handwritten letter in reply to your letter of July 26, 1948 (Trustee's Exhibit No. 1)?

"A. Yes.

"Interrogatory No. 14: If your answer to the foregoing question is yes, will you please have the Notary Public attach these two photostatic copies to your deposition with the letter of July 26, 1948, marked Trustee's Exhibit No. 1, and the handwritten reply marked as Trustee's Exhibit No. 2 for identification, and have them transmitted back to the Court with this deposition? A. Yes."

Mr. Quittner: If your Honor please, we interpose the same objection heretofore made as to the use of Trustee's No. 1 and Trustee's No. 2 on the ground that they are photostatic copies and the originals have never been introduced.

The Referee: He didn't have the originals for use at that time.

Mr. Quittner: He could have gotten the originals. They had the originals.

The Referee: Just a moment. I am talking to Mr. Tobin now.

Mr. Tobin: We tried to call Wishnow on the stand and Goldberg, and the question arose as to whether or not [21] the company had acted on the strength of that letter, and the Court adjourned the matter for the taking of the deposition of the person by whom the credit was extended—or the extension of time granted. And the Court had me take that, as attorney for the Trustee, take that Exhibit No. 1 and have it photostated.

The Referee: What Court did that?

Mr. Tobin: Your Honor.

The Referee: I wasn't here on July 26, 1948.

Mr. Tobin: Oh, no. It was at the trial before that.

The Referee: I wasn't here in July.

Mr. Tobin: Yes, your Honor, your Honor was.

The Referee: I wasn't here in July then.

Mr. Tobin: No. This was in 1949.

The Referee: This is July 26, 1948.

Mr. Tobin: But it was offered in evidence here in court before your Honor.

Mr. Quittner: On the trial.

The Referee: When did you get this letter, this original?

Mr. Tobin: When did I get it?

The Referee: From the bankrupt?

Mr. Tobin: We got that from Walbrooke Clothes.

The Referee: When did you get that?

Mr. Tobin: Before the specifications of objections were prepared. [22]

The Referee: Did you get this before—you must have gotten this before the deposition was taken.

Mr. Tobin: Oh, yes. It was offered in evidence here.

The Referee: And how long before that did you get it from the bankrupt?

Mr. Tobin: We didn't get it from the bankrupt.

The Referee: That is right. You got it from Walbrooke Clothes.

Mr. Tenner: I understood Mr. Tobin before to say that he got this from the books of the bankrupt. If he got the original document from the books of the creditor, we renew our objection.

Mr. Tobin: On what basis?

Mr. Tenner: That couldn't be used for the purposes of identification at the time of the taking of the deposition.

The Referee: The objection is overruled.

Mr. Quittner: In the trial here all we had was a 21 examination. The only thing we have had heretofore was a 21 examination. We never had a trial.

Mr. Tobin: If your Honor will examine the record your Honor will find the specifications of objections were brought on for hearing and practically completed, except for this deposition.

The Referee: That is my recollection.

Mr. Tobin: And your Honor said that we had to have a [23] deposition taken on the question of

whether or not they acted on the strength of that letter. Mr. Malamud stipulated that the deposition could be taken, and then Mau changed attorneys.

The Referee: Go on.

Mr. Quittner: I could answer that if I could check—I would like to check the dates. These things were taken after specifications were filed? I have been——

Mr. Tobin: We tried this case before your Honor on May 10, 1949.

Mr. Quittner: When were the specifications filed?

Mr. Tobin: The amended specifications. The record up there will show it. All I have is an office copy.

Mr. Quittner: I want to correct the record.

Mr. Tobin: The amended specifications were written up on July 7, 1949.

Mr. Quittner: How could we have tried it in May, then?

The Referee: What difference does that make?

Mr. Quittner: I want to correct the record.

The Referee: Do you contend that this letter was never sent by Mr. Goldberg?

Mr. Quittner: We are trying it on the deposition——

The Referee: Just answer my question: Do you contend that this letter was never sent by Mr. Goldberg?

Mr. Quittner: I have no personal knowledge. [24]

The Referee: Do you contend that it was not?

Mr. Quittner: I don't know. I want him to prove it.

The Referee: You don't know anything about it. Now, then, Mr. Mau, come forward.

JACK MAU

recalled as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

The Referee: Did you receive this letter from Mr. Goldberg on or about the date it bears, July 26, 1948?

The Witness: I received this letter.

The Referee: About that date?

The Witness: Around that date. It must have been. I don't remember the exact date.

The Referee: But it was about that date or shortly afterwards?

The Witness: Shortly afterwards.

Mr. Tenner: May I ask Mr. Mau if he was familiar with Mr. Goldberg's signature?

The Witness: I don't even know Mr. Goldberg sent it.

The Referee: That is settled. I don't care whether he is or not. Go ahead.

Mr. Tobin: At this time, if your Honor please, I would like to have the writing on the back of that letter marked as Trustee's Exhibit No. 2, and offer it in evidence.

The Referee: Well, I think——

Mr. Tobin: No. 1 is already in evidence. [25]

The Referee: I think that is unnecessary, because Exhibit No. 1 includes the document.

Mr. Tobin: But in this deposition I asked him: "If your answer to the foregoing question is yes, will you please have the Notary Public attach these two photostatic copies to your deposition with the letter of July 26, 1948, marked Trustee's Exhibit No. 1, and the handwritten reply marked as Trustee's Exhibit No. 2 for identification, and have them transmitted back to the Court with this deposition?"

With that being marked Trustee's No. 2 for identification I would like to put it in evidence.

The Referee: I will so consider the whole document, Trustee's Exhibit No. 1, as in evidence, and properly before the Court for consideration.

Mr. Tenner: May I have the record show that we make the same objection; there has been a lack of proper foundation.

The Referee: Your objection is overruled.

Mr. Tenner: I would like to make them for the record's sake, your Honor. I would like to have the record show——

The Referee: All right. The objection is overruled.

Mr. Tenner: Can I give it to the reporter?

The Referee: You have stated it over and over again. Do you want to do it again?

Mr. Tenner: All I want is to add to my objection. We made the additional objection that there has been a lack [26] of proper foundation or identification of Mr. Goldberg's signature.

The Referee: That is overruled.

Mr. Tenner: I just want it in the record.

Mr. Tobin: And the answer is "Yes."

The Referee: Go ahead. The most ridiculous objection I ever heard in any court in this land. Go ahead.

Mr. Tobin (Reading):

"Interrogatory No. 15: Calling your attention to the second paragraph of Trustee's Exhibit No. 2 for identification, reading as follows: 'My case, as Mr. Wishnow knows, was postponed for three weeks more. There is \$12,500 in escrow to be released to me as soon as we get the court order.'

"Did you believe from that written statement that the bankrupt, Jack Mau, had \$12,500 in escrow to be released to him as soon as he got the court order?

"A. Yes."

Mr. Tenner: May the record show that we make the same objection on the use of the exhibit?

The Referee: Same ruling.

Mr. Tobin (Reading):

"Interrogatory No. 16: Prior to receiving Trustee's Exhibit No. 2 for identification, had you, as credit manager for Walbrooke Clothes, Inc., been pressing the bankrupt, Jack Mau, for payment of his invoice of April 22, 1948, [27] amounting to \$730.92?

"A. Yes, we had sent at least two letters to Mr. Mau, advising him that his account was overdue and that we would be compelled to turn this matter over for collection and suit, if it was not paid. Inasmuch as Mr. Mau advised our representative, Mr. Wishnow, that he was having matrimonial difficul-

ties and that he had put in escrow \$12,500, and on the strength of Mr. Mau's reply to us, also stating that fact, we withheld suit."

Mr. Tenner: If your Honor please, we make an objection to that answer and move to strike out the answer on the following grounds:

First, that the answer is not responsive to the question, the question being: Did you ever press him for payment?

Second, we make objection to the question that it is hearsay—I mean we make objection to that answer and move to strike the answer; it is hearsay as to the fact that they sent this letter to Mr. Mau, without introducing the letter, and as to whether he advised Mr. Wishnow, and as to the contents of Mr. Mau's reply.

And on the additional ground that it is not responsive to the question, and that the whole thing is hearsay.

The Referee: Take one at a time, now.

Mr. Tobin: You can't take your position piecemeal. Mr. Wishnow testified that he had received word from the [28] home office to press for payment of this obligation, and that he had been trying to collect it, and this is simply connecting up the testimony of Wishnow.

That is the difficulty of a case being tried by two sets of attorneys. Mr. Malamud was the attorney at the beginning of the trial, and when Wishnow was on the stand and Mau was on the stand.

The Referee: Is there any reporter's transcript

of the testimony taken in this matter previously?

Mr. Tobin: It hasn't been written up.

Mr. Quittner: If your Honor please, I don't want to correct Mr. Tobin. Mr. Tobin was not the original attorney here, either. Mr. Early was. I have been in this case since the specifications were filed, and this is the first day of trial on the specifications. I just asked Mr. Mau——

The Referee: You don't know whether it is the first day or not. It is the first day of trial that you participated in.

Mr. Quittner: This is the first day we are coming to trial.

Mr. Tobin: If the Court will go back to May 10th, the Court will see that it was on the calendar.

Mr. Quittner: How could you try it before the specifications were filed?

Mr. Tobin: Because we amended to conform to the proof. [29]

The Referee: Answer that question: How can you try any action before the specifications are filed?

Mr. Tobin: They were filed.

The Referee: How could you try this case before me or somebody else before the specifications were filed?

Mr. Tobin: May I see the Court's file for just a moment? I think I can straighten this out. It is just an attempt to confuse everything. I can straighten it out.

Mr. Quittner: I resent the fact——

The Referee: Sit down. I don't care what you resent. It makes no difference to me.

Mr. Quittner: Mr. Tobin keeps making these remarks.

The Referee: Will you please sit down and behave yourself? I am not interested in what Mr. Tobin says about you or you say about him. I am trying to get the facts and to apply the law properly.

Mr. Quittner has raised a point that I want to know about.

Mr. Tobin: The Court's record shows that on the 25th of January, 1949, an order was entered by this Court extending the time within which to oppose the discharge of the bankrupt, to February 2, 1949.

The record of this Court shows that on February 25, 1949, specifications of objections to the discharge of the bankrupt, signed and verified by Paul W. Sampsell, Trustee, were filed 45 minutes past 9 a.m.

The record also shows that on February 24, 1949, copies of the specifications of objections—no—withdraw that. The record also shows that an order was made by this Court fixing the time and place for hearing the objections to discharge for April 8, 1949, at 10 a.m., signed by Referee Hunt, and the affidavit of mailing was filed March 3, 1949, signed by Reta A. Griffin.

The record also shows a notice of motion, signed by Francis F. Quittner, returnable July 5, 1949, to strike specifications of objections to the discharge of the bankrupt was filed July 29, 1949, and a motion to strike the specifications of objections to dis-

charge was likewise filed.

The record also shows that on July 8, 1949, amended specifications of objections to the discharge of the bankrupt were filed by me.

The record also shows that hearing on the amended specifications was set for the 19th of August, 1949, at 10 a.m.

The Referee: Well, Mr. Tobin, what I want to know——

Mr. Tobin: Well——

The Referee: Wait a moment. What I want to know is this: When was this testimony taken whereof you speak?

Mr. Tobin: My record shows May 10th.

The Referee: And have you——

Mr. Tobin: We went to trial on the original [31] specifications here, and a lot of objections were raised to the form of the specifications, and amended specifications were filed. However, if your Honor wishes, I will put Mr. Mau on the witness stand for 2055 and go over that again.

The Referee: Either that or have the testimony written up, because if there was any testimony taken before we went to trial on the specifications, it would be irrelevant. In other words, you couldn't take any testimony on this matter until after the specifications were filed, whether original or amended.

Mr. Tobin: The original specifications were on file long before this hearing of May 10th.

The Referee: They were?

Mr. Tobin: Yes.

The Referee: Is there any question about that?

Mr. Quittner: Those original specifications were stricken by the Court.

The Referee: No, they weren't stricken. They were allowed to be amended.

Mr. Quittner: Well, the Court struck out three specifications.

The Referee: I know that, but the whole specifications were not stricken. We struck out three but left in, as I recall——

Mr. Quittner: Three to be amended.

The Referee: Yes. The whole document was not [32] stricken, though.

Well, Mr. Tobin, either way: You can have the testimony written up, or take it all over again.

Mr. Tobin: I don't know what there is in this estate in the line of funds.

The Referee: I can't help you on that. I don't know, either.

Mr. Tobin: Well, I will suspend reading this deposition and put Mr. Mau on the witness stand.

The Referee: Very well. Mr. Mau, come forward.

JACK MAU

recalled as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

Examination

By Mr. Tobin:

Q. Your name is Jack Mau?

(Testimony of Jack Mau.)

A. Yes, sir.

Q. You are the bankrupt in this proceeding?

A. Yes, sir.

Q. You were in the clothing business?

A. Yes, sir.

Q. In Hollywood? A. No. In L. A.

Q. 137 East Seventh Street?

A. Yes, sir. That is right.

Q. Do you know Walbrooke Clothes, Inc.? [33]

A. I do.

Q. Did you buy any merchandise from them on credit? A. I did.

Q. Amounting to \$730.92?

A. That is right.

Q. And on how much time did you buy those clothes?

A. I bought them from Mr. Wishnow, 60 days or longer past the original day they would ship them.

The Referee: Let us identify Mr. Wishnow.

The Witness: Very good friend of mine.

Q. (By Mr. Tobin): What is his occupation?

The Referee: Who does he represent?

The Witness: Walbrooke Clothes.

Q. (By Mr. Tobin): He was their local representative? A. Yes, sir.

Q. You didn't pay any invoice when it was due, did you? A. No, I didn't.

Q. And on or about July 26, 1948, did you receive Trustee's Exhibit No. 1?

Mr. Tenner: Just a minute, Mr. Mau. I will

(Testimony of Jack Mau.)

object to that: Without proper foundation of the person who wrote that letter.

The Referee: The objection is overruled. The question is: Did you receive that letter on or about that date?

The Witness: I think I did. [34]

Q. (By Mr. Tobin): Did you reply to it?

A. Can I explain to the Court?

Q. Did you reply to it?

A. Can I explain how?

Mr. Tenner: Answer the question.

The Witness: Yes.

Q. (By Mr. Tobin): How did you reply?

A. Can I explain now how?

Mr. Tenner: You just answer the question.

The Referee: I will let him tell.

The Witness: This letter was wrote at Mr. Wishnow's bidding.

The Referee: You mean your reply was?

The Witness: Yes, sir.

The Referee: All right.

Q. (By Mr. Tobin): Did you——

The Referee: Wait a moment. Your reply is contained on the back of this exhibit, isn't it?

The Witness: Yes, sir.

The Referee: All right.

The Witness: I possibly didn't word it properly. I left out a few "ands," and "buts," not knowing the technicality of it.

Q. (By Mr. Tobin): Calling your attention to

(Testimony of Jack Mau.)

the second paragraph on the back of Trustee's Exhibit No. 1, reading as follows: [35]

"My case, as Mr. Wishnow knows, was postponed for three weeks more. There is \$12,500 in escrow to be released to me as soon as we can get the court order."

Paragraph: "Please be patient with me, and I will——" What are those words there (indicating)?

A. "straighten everything out with you so I can do business with you in the future, so both of us can prosper." I think Mr. Wishnow knew.

Q. Wait a moment.

The Referee: Just confine yourself to the question.

Q. (By Mr. Tobin): Did you have \$12,500 in escrow at the time you wrote that? A. No.

Q. Did you have any money in escrow at the time you wrote that? A. No.

Q. And was an escrow to be released to you soon?

A. If it had materialized it would have.

Q. But it didn't exist?

A. No, it hadn't come up yet. That is right.

Q. And you sent that reply back to Walbrooke Clothes, Inc.? A. I did.

Q. Did you ever pay the bill?

A. No, I didn't.

Q. Were you ever sued on it? [36]

A. No.

Q. Did you ever pay any part of it?

(Testimony of Jack Mau.)

A. I didn't.

Q. And there is no part of it paid now?

A. No.

Mr. Tobin: Now, I would like to offer this in evidence, if your Honor please.

The Referee: It is already in evidence.

Mr. Tobin: Pardon me.

Q. (By Mr. Tobin): You knew at the time you put that statement in that letter that there was \$12,500 in escrow that would be released to you soon, that that was an untrue statement, did you not?

A. There wasn't \$12,500 in escrow at all.

Q. You knew it was an untrue statement?

A. May I say you can call it misquoting——

The Referee: No. Irrespective of how it was done, was that a true or an untrue statement that you had \$12,500 in escrow?

A. I did not have \$12,500 in escrow.

Q. (By Mr. Tobin): Then it was untrue?

A. That is right.

Q. And you knew it was untrue?

A. That is right, at the time.

Q. You were seeking a further extension of time to pay—— [37]

The Referee: Ask him why he put it in there if it was untrue.

Mr. Tobin: This question is preliminary:

Q. (By Mr. Tobin): You were seeking further time in which to pay, isn't that right?

(Testimony of Jack Mau.)

A. No.

Q. What was your reason for putting that statement in there, that untrue statement, that there was \$12,500 in escrow that would be shortly released to you?

A. It is the same as the last explanation, I said that Mr. Wishnow knew what was happening to me. It is right in there on your letter, the second paragraph. It says here: "I just got back today, and I saw Mr. Wishnow. I have been home three weeks with a nervous breakdown," which I can also verify. "My case, as Mr. Wishnow knows, has been postponed for three weeks."

Q. Yes. Go on and read.

A. (Reading): "There is \$12,500 to be released to me as soon as we can get a court order." It should have been—there—it should have been, "There will be \$12,000 released to me as soon as Mrs. Mau signs her statement." That was the mispronounce—that was the missing thing I put in there.

Q. You have got "\$12,500" in that letter?

A. Yes.

Q. You just read it \$12,000." [38]

A. It says "\$12,500."

Q. Yes. That is what you put in the letter?

A. Yes, that is right.

Q. How did Mr. Wishnow know that your case had been postponed for three weeks?

A. We had been discussing it.

Q. You told him?

(Testimony of Jack Mau.)

A. Yes. Mr. Wishnow happens to be a very good friend of mine.

Q. So you told Mr. Wishnow that your case had been postponed three weeks?

A. We were talking——

The Referee: Just answer the question.

The Witness: No, I didn't tell Mr. Wishnow what was in that letter. I couldn't have told him. We were discussing my case as it should have been.

Q. (By Mr. Tobin): Mr. Mau, you understand English all right? A. I think so.

Q. Did you tell Mr. Wishnow that your case had been postponed three weeks?

A. Yes, I did.

Q. And that was where he got his information from, was you? A. That is right.

Q. And did you tell Mr. Wishnow that there was [39] \$12,500 in escrow?

A. I would get out of escrow, that is right.

Q. And that was untrue?

A. It wasn't untrue if I would have gotten what I was to have gotten.

Q. You said here that there was?

A. Can I answer the question? Maybe this will clear it up, a lot of things. Mr. Wishnow said, "Jack, do me a favor. Write him a letter you can give me one hundred or two hundred or three hundred." He said, "It will look good for me." I wrote this letter. Mr. Wishnow, himself, mailed the letter while he was in front of me. Nothing in

(Testimony of Jack Mau.)

this letter that I meant to convey that I was seeking further credit, because my whole bill, possibly, was not even 30 days past due.

The Referee: Why did you put that statement in?

The Witness: I had just been very sick——

The Referee: Why did you put that in if you knew it was untrue?

The Witness: Well, what I meant to put in, as I say, as I explained to the Court before, I said—what I should have put in, being nervous at the time, “There will be.” If I had put in, “There will be,” this whole thing would have been nothing.

The Referee: I don’t see much difference.

The Witness: “There will be” instead of “There is” [40] is two different things.

The Referee: Why didn’t you put in, “There will be”?

The Witness: I can assure the Court I meant “There will be.”

The Referee: What you mean don’t help us any. What you did is the important thing. A man may mean to do the right thing and go out and kill somebody.

The Witness: It was done very honorable. It wasn’t done with any other intention.

The Referee: You are bound by what you did. Go ahead, Mr. Tobin.

Q. (By Mr. Tobin): But you did want further time to pay?

(Testimony of Jack Mau.)

A. There was nothing mentioned of time or anything else.

Q. You didn't want to be sued?

A. There was no mention of suit. There wasn't any mention of suing or anything else. I could have, possibly, sent \$50 to stop a suit, which Mr. Wishnow told me——

Mr. Tobin: That is all for this witness.

Examination

By Mr. Tenner:

Q. Mr. Mau, you used a figure here, "\$12,500" in escrow. Would you tell the Court what kind of escrow you are talking about and why you said, "\$12,500," as distinguished from any other sum of money? A. Yes. I would be glad to. [41]

Mr. Tobin: That will be objected to as an attempt to alter or vary a written instrument.

The Referee: Not necessarily. "There is \$12,500 in escrow." He doesn't explain what that escrow is. If there was any escrow he can explain it. He hasn't any——

Mr. Tobin: "To be released to me as soon as I get the court order."

The Referee: Yes.

The Witness: Can I explain that?

Q. (By Mr. Tenner): Just answer the question, if you know, Mr. Mau, what escrow you had in mind, if any, and why you said, \$12,500," as distinguished from any other sum of money?

(Testimony of Jack Mau.)

A. The Bank of America, Mr. Dean, was negotiating a loan on the home for \$11,500.

Q. Mr. Dean is who?

A. Vice president of the Bank of America.

Q. Which branch? A. Main office.

Q. He was negotiating a loan on what?

A. On my home.

The Referee: To you? A loan to you?

The Witness: As a loan to the bank, to protect the bank.

The Referee: But the loan was to protect the bank on its claim against you? [42]

The Witness: That is right.

The Referee: Go ahead.

The Witness: The Bank of America would have given—taken a first and second mortgage for the loan that I had with the bank. The Bank of America wanted to give us \$11,500. I had agreed to do that, and Mrs. Mau had agreed to do that, also.

The Referee: Let me ask you a question.

The Witness: Yes, sir.

The Referee: If that money was to go to the bank why did you say here it would be released to you?

The Witness: Again, I can say, your Honor, that \$11,500 was to the bank—I was to have gotten \$1,000 from the \$11,000 — \$1,000 — absolutely, through Mr. Dean.

(Testimony of Jack Mau.)

The Referee: You were to get 1,000 cash and the bank was to get \$11,500?

The Witness: Yes.

The Referee: Now, we are clear on that; so you were to get \$1,000?

The Witness: \$1,000 in cash and \$11,500, which I was to get off the note, and the Bank of America was negotiating to take—in fact, they had negotiated with my wife. That is why I happened to say, \$12,500.”

Q. (By Mr. Tenner): And you had arranged for an escrow with the Bank of America?

A. I had arranged, spoke to Mr. Dean. Mrs. Mau was [43] called in, and she had agreed to sign.

Q. When you say there was \$12,500 in escrow, did you mean that was the total sum given that was to go into escrow?

Mr. Tobin: I object. Leading and suggestive.

The Referee: Yes. I think counsel is right. Overruled.

Mr. Tobin: Read the question.

(Question read.)

The Witness: \$11,500 would have went into escrow, and I would have gotten \$1,000.

Q. (By Mr. Tenner): What did you intend to do with the \$1,000?

A. Do as Mr. Wishnow said, to send one hundred or two hundred and pay it off.

Q. You mentioned that Mr. Wishnow came to

(Testimony of Jack Mau.)

you and he said, "Jack, write something back to Walbrooke"? A. Yes.

Q. Did Mr. Wishnow have any relationship with Walbrooke?

A. He was their representative.

Q. And he knew you were only going to get \$1,000 from the bank? A. Yes.

Q. And he asked you to write this letter, and you gave him the letter to be mailed?

A. Mr. Wishnow—I said, "I got a letter from Mr. [44] Goldberg this morning." He said, "Jack, write him back something."

The Referee: Did Mr. Wishnow ever say what you should write?

The Witness: He was standing at the opposite——

The Referee: Did he ever see, as far as you know, or read what you did write?

The Witness: That I don't think he read it along with me. He said, "Write——"

The Referee: Never mind that. Did he ever see, as far as you know, or read what you did write?

The Witness: I don't think so.

The Referee: When you gave him the letter to mail, was the letter sealed?

The Witness: Yes. He said, "Gee! That is sealed".

The Referee: And he knew you didn't put any money in there?

The Witness: Yes.

(Testimony of Jack Mau.)

The Referee: Had you ever received any communication from Mr. Wishnow in which he said, "If you don't pay, we are going to sue you?"

The Witness: No.

The Referee: Had you ever been attached?

The Witness: No.

The Referee: Had you ever been threatened with any kind of action that you would? [45]

The Witness: No.

The Referee: Was this letter asking you about the money the first communication you ever got from him?

The Witness: I think so.

The Referee: Did they answer your letter?

The Witness: No, they did not.

The Referee: Did they ever communicate in any way with you since that time?

The Witness: No, they haven't.

The Referee: All right. Go ahead.

Mr. Tenner: Just a moment. We have got no further questions.

Mr. Tobin: That is all.

(Witness excused.)

Mr. Tobin: I will resume reading the deposition.

Mr. Tenner: We have a motion to strike. Will your Honor rule on our motion to strike 16?

Mr. Quittner: Two grounds to strike: One was testimony as to the contents of a written instrument, and, secondly, they were testifying to hearsay.

The Referee: The answer doesn't cover the con-

tents, other than just a general statement. How about that, Mr. Tobin? Then he says, "Yes, we have sent at least two letters." Mr. Goldberg advised him that the account was overdue and that they will be compelled to turn the matter over for collection, if it wasn't paid. Did you ever see [46] those letters?

Mr. Tobin: It is a question of fact.

The Referee: They were turned over to the trustee by the bankrupt?

Mr. Tobin: No, your Honor, as far as we know.

The Referee: Did you ever get copies of those?

Mr. Tobin: No, your Honor.

The Referee: In view of these objections you should have the copies they sent as secondary evidence. You are not required to produce the originals if the bankrupt doesn't turn them over. Does the bankrupt have those in his possession?

Mr. Quittner: All records are in the possession of the Trustee.

The Referee: Then I will give you time to find—to get from this credit manager, who makes this deposition, his copies of the letters sent.

Mr. Tenner: There was the further motion on the ground that it is not—the whole answer isn't responsive to the question, even if they had the letters.

Mr. Quittner: And also the testimony as to what Mr. Wishnow said would be hearsay.

The Referee: What about that?

Mr. Tobin: Well, the bankrupt has just testified

that he told Wishnow that—he absolutely corroborates the answer. [47]

Mr. Quittner: If you will accept our version of what we will stipulate——

Mr. Tobin: No. The bankrupt volunteered—he told you——

Mr. Quittner: That hasn't anything to do with it.

The Referee: Never mind. Don't jabber among yourselves. Address the Court, please.

Mr. Tobin: If your Honor please——

The Referee: Wait a moment, Mr. Tobin. Hasn't Mr. Mau's testimony covered what this witness says in this second sentence of his answer to Interrogatory No. 16?

Mr. Tobin: Yes, your Honor, and I am going to offer that Interrogatory No. 16 over again, now having been connected up by the bankrupt's testimony on the stand here that he told Wishnow about his marital difficulties, so it is outside of the realm of hearsay. I read the question and the answer first, then the objection came in here, and we put the bankrupt on the stand. Now, the bankrupt corroborates it, so I will read it over again, the bankrupt having connected it up.

The Referee: Well, now, let's see. It is in evidence that Mr. Mau advised their representative, Mr. Wishnow, that he was having marital difficulties, that he had put in escrow \$12,500.

Mr. Tobin: He just testified here——

The Referee: What this witness says in this [48]

deposition would be hearsay, but that, I think, is overcome by the witness' testimony to the same effect, and in other words, it is a harmless statement by the person answering this question.

Now, then, he says on the statement of Mr. Mau's reply to us and also stating that fact we would have sued. The letter of Mr. Mau seems to me to corroborate the entire answer given by this witness to Interrogatory No. 16. I think the point of counsel here, notwithstanding, would be good as to whether or not—for Mr. Mau's testimony. I think it fully corroborates that answer, so I will allow it to stand. Proceed with the next one.

Mr. Tobin: (Reading)

"Interrogatory No. 17: Had you given instructions to your local representative, Ellis Wishnow, to present this claim for payment?"

"A. Yes, we wrote Mr. Wishnow to see Jack Mau regarding his past due bill, and Mr. Wishnow advised us that he was having matrimonial difficulties and that his money was tied up in escrow, but that we would get paid and not to press him for the money."

Mr. Quittner: I move to strike that out on the ground of hearsay. That letter, allegedly written to Wishnow, gave him instructions, and if those instructions were oral it would be hearsay.

The Referee: I don't think the letter written to Wishnow is material. "Mr. Wishnow advised us he was having matrimonial difficulties and that his money was tied up in escrow, but that we would get

paid and not to press him for the money." What is wrong with that?

Mr. Quittner: What Mr. Wishnow told Mr. Goldberg is hearsay.

The Referee: It isn't hearsay.

Mr. Quittner: How do we know——

The Referee: Don't get so excited and shout around. Calm yourself. He says, "Mr. Wishnow advised us he was having matrimonial difficulties." Nothing hearsay about that. "That his money was tied up in escrow." Nothing hearsay about that.

Mr. Quittner: We have here, your Honor, Mr. Goldberg testifying to what Mr. Wishnow told him, without having our opportunity to examine Mr. Wishnow.

The Referee: You can have him here.

Mr. Quittner: But that——

The Referee: We won't go into that any further. If you want to question Mr. Wishnow, we will give you an opportunity to do so.

Mr. Quittner: The other objection that we have for the sake of the record is that the question says, "had you given instructions to your local representative, Ellis Wishnow," and the answer came that came back is what Wishnow told him, and we object on the ground that it is not responsive [50] to the question.

The Referee: Your objection is overruled. You are at liberty to produce Mr. Wishnow and examine him on just what he told Goldberg or the Walbrooke Clothes or both of them.

Proceed.

Mr. Tobin: (Reading)

“Interrogatory No. 18: Upon the receipt of Trustee’s Exhibit No. 2 for identification, did you then refrain from pressing this claim for immediate payment?”

“A. Yes.”

Mr. Quittner: We make an objection to that question, your Honor, on the ground that the question calls for conclusions from documents not properly identified and, also, calls for a self-serving declaration.

The Referee: Your first objection, “not properly identified,” is overruled.

Now, then, you object to the portion of his answer which refers to “Did you then refrain from pressing this claim for immediate payment?”

Mr. Quittner: Yes, self-serving.

The Referee: What was your objection to that?

Mr. Quittner: Self-serving.

The Referee: Nothing self-serving about it. Did he or didn’t he refrain? He says he did refrain.

Go ahead, Mr. Tobin. [51]

Mr. Tobin: (Reading)

“Interrogatory No. 19: If you had known that there was not the sum of \$12,500 in escrow to be released to Jack Mau as soon as he could get the court order, as set forth in Trustee’s Exhibit No. 2 for identification, would you have granted any further time to Jack Mau for the payment of this account?”

“A. No.”

Mr. Quittner: We move to strike out the answer to Interrogatory No. 19 on two grounds heretofore made to Interrogatory No. 18, namely that it is an improper identification of a document, and, two, it calls for a self-serving declaration, and, three, it is a conclusion that he granted any further time to Jack Mau for the payment of this account. No evidence that he granted any time.

The Referee: When a witness says he did grant—what was your last point there?

Mr. Quittner: That he granted any further time to Jack Mau.

The Referee: What is wrong with that?

Mr. Quittner: He didn't grant any time.

The Referee: How do you mean he didn't grant any time? He didn't sue, did he?

Mr. Quittner: We would like the record to show that that was not granting further time by not suing.

The Referee: What? [52]

Mr. Quittner: We would like the record to show that that was not granting further time by not suing. The mere refraining from pressing a civil action in court is not granting further time.

The Referee: That is something else, again. Let the record so show. Interrogatory No. 20?

Mr. Tobin: (Reading)

“Interrogatory No. 20: If your answer to the foregoing question is no, then please state briefly what you would have done as credit manager for Walbroke Clothes, Inc., in seeking to collect this account?

“A. We would have turned his account over to the London Guaranty & Accident Company, with whom we hold our credit insurance and who was doing our collections for us, who would have turned same over to their attorneys for further attention.”

Mr. Quittner: We move to strike out that answer, for the purposes of the record, because it is pure conjecture as to what he would have done.

The Referee: How far a creditor relied on matters presented to him I think is quite material to show what he would have done if what was represented to him was untrue. Go ahead, Mr. Tobin.

Mr. Tobin: (Reading)

“Interrogatory No. 21: Did you receive any advices from your Los Angeles representative, Ellis Wishnow, in [53] connection with holding off or forbearing in pressing collection of this account against the bankrupt at or about the time you received Trustee’s Exhibit No. 2 for identification?

“A. Yes, as explained in Interrogatory No. 16.”

Mr. Quittner: I would like the record to show that we make the same motion to strike out the answer to this question on the grounds heretofore raised on our motion to strike Interrogatory No. 16, on the ground that the answer is not responsive to the question and on the ground it is also hearsay as to what——

The Referee: Why isn’t it responsive?

Mr. Quittner: The question is: “Did you receive any advices from your Los Angeles representative, Ellis Wishnow, and so forth, and the answer

Mr. Quittner: I would like the record to show, before we make our objection to Interrogatory No. 22, that two lines have been X'd out above the answer: "I herewith turn same over for identification," I would like the record to show that upon reading the X'd out phrases the words appear to say that "the same——"

The Referee: Wait a moment. If it is X'd out, it is not part of the deposition. Therefore, what right have I got to consider what is under the X-ing out? [56]

Mr. Quittner: The rule under Section 30-E of the Federal Civil Procedure states that "Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer, with a statement of the reasons given by the witness for making them."

The Referee: All right, now.

Mr. Quittner: Where the answer is X'd out, I think the Court——

The Referee: I don't know about the rule. The fact is that it isn't in the deposition. I have to consider what is left in.

Mr. Quittner: He has to say why he changed the answer.

Mr. Tobin: I am willing to read the X'd out part. (Reading) "The same were turned over to London Guaranty & Accident Co., who I believe have them in their possession."

Then he apparently got it, and he says, "I herewith turn same over for identification." They are

attached to the original document. I did not get copies with my copy of the deposition.

The Referee: Have you seen it?

Mr. Tobin: No.

The Referee: You read it and show it to him, and we will recess until you send for me.

(Recess.)

The Referee: Let us proceed.

Mr. Tobin: If your Honor please, at this time, in [57] connection with that last answer, I would like to offer these other communications in evidence as Trustee's Exhibit No. 3.

Mr. Tenner: If your Honor please, in connection with the opposition to the introduction of Trustee's Exhibit No. 3 into evidence, we make the following objections for the purposes of record:

We might call the Court's attention to the fact that the deposition, in the form it is there, is violative of Rule 30-E, and this entire answer thereto, regardless of whether or not it has now been read into evidence, is defective on the theory that no reference is given in the deposition as to why a change in form and substance was made.

We further make——

The Referee. What change in form and substance?

Mr. Tenner: The scratching of the two lines and the typing of the third line. I don't know what happened, and there is no statement as to why it happened.

The Referee: I don't care why it happened.

Counsel has read it now and it is in evidence. That answers that.

Mr. Tenner: If that statement is in evidence, then I move to strike out the last answer, being contradictory to the scratched out portion—the scratched out portion being contradictory to the answer below that “I turned the same over for identification.” [58]

The Referee: What is contradictory there? I don’t see what is contradictory there. That objection is overruled.

Mr. Tenner: And we make the further one on the basis that that—and we make the motion to strike and the motion to exclude Trustee’s Exhibit No. 3 because there is no original copy of these letters or reports in evidence, and no copies of the written—there are no originals of the reports or letters which we can even compare with the photostats in this case, and, also, of course, they are hearsay.

The Referee: All right—now, wait a moment. We, therefore, will continue the matter to give counsel for the Trustee time to secure the letters sent by Jack Mau, which are attached to this deposition in the form of photostats——

Mr. Tenner: They are letters to make——

The Referee: Now, wait a moment. And you will call upon the bankrupt to produce the letter dated August 19, 1948, and addressed to him by Mr. Goldberg, and we will give counsel for the Trustee time to produce any originals that may exist,

or any evidence that he may want to produce, the Trustee, regarding this——

Mr. Quittner: We would like the record——

The Referee: Wait a moment. Please, now!

Mr. Quittner: I thought you were finished.

The Referee: I have told you gentlemen over and over and over again not to talk when the Court is talking. I can't [59] think. I will hear you fully, but wait until your turn comes.

The Trustee will have time to communicate with Mr. Goldberg and to secure from him, either by deposition or whatever way the Trustee's counsel is advised, the originals of the documents which are attached in the form of photostats in this deposition and apparently is addressed to a man by the name of Ellis by Mr. Goldberg.

We have here before us the original letter, the photostat, which is attached to the deposition, and the original letter written by Mr. Goldberg to Mr. Mau under date of July 26th. Then we have in evidence the photostat of the original—we have in evidence the original of the photostat attached to this deposition wherein Mr.—the photostat thereof wherein Mr. Mau speaks of the escrow, \$12,500.

Now, then, we do not have here the original of the form letter—I can't see anything—I can't see any date given here where Mr. Mau wrote to Mr. Goldberg about certain matters. I will read it: "I just got back today and saw Mr. Wishnow——"

Mr. Tobin: That original is in evidence. That is No. 1.

The Referee: No. Wait a moment. No. 1?

Mr. Tobin: Yes, your Honor. The original of that is in evidence. [60]

The Referee: This is that escrow letter?

Mr. Tobin: Yes.

The Referee: Oh, apparently we have here——

Mr. Tobin: Apparently got an extra copy made.

The Referee: That is in evidence all right. That covers all these, doesn't it?

Mr. Tobin: I think so.

The Referee: Now, how much time do you want?

Mr. Tobin: I am not quite through with the deposition yet. I have got two more questions.

The Referee: Yes, I know, but how much time do you want?

Mr. Tobin: It will probably take another 30 days.

The Referee: All right. It will be granted.

Mr. Quittner: May we have the record show that we have asked Mr. Mau about letters that the Court asked him to bring, and he doesn't have them. He has turned all his documents and papers, letters, and so forth, over to the Trustee.

The Referee: Well, the burden is upon Mr. Mau to produce the originals, and if he hasn't them all, he can get copies as secondary evidence.

Go ahead.

Mr. Tobin: (Reading)

"Interrogatory No. 23:——"

The Referee: Wait until I get that. [61]

Mr. Quittner: The record should show no notice to produce by the Trustee, in order to come within the secondary evidence rule.

The Referee: I didn't get that.

Mr. Quittner: The Court knows that in order to introduce secondary evidence, before trial we have to have notice to produce——

The Referee: I am not insisting on that rule.

Mr. Quittner: We do.

The Referee: I will give counsel time to get it.

Mr. Tobin: Now, there is already testimony that he never received any such letters.

The Referee: What letters?

Mr. Tobin: Any letters except that one that is in evidence as Trustee's Exhibit No. 1. He has already shown he never received any of those letters.

The Referee: Anyway, you are going to have that extra time.

Mr. Tobin: (Reading.)

“Interrogatory No. 23: Has the account, amounting to approximately \$730.92, owing to you or to your company by the bankrupt, Jack Mau, ever been paid? A. No.”

Mr. Quittner: I would like the record to show that we make no motion in objection to that question and no motion to strike. [62]

The Referee: What a relief!

Mr. Tobin: (Reading)

“Interrogatory No. 24: If the answer to the foregoing interrogatory is no, please state what, if anything, motivated you as credit manager for Walbrooke Clothes, Inc., in deferring action in collecting this account?

“A. Because we relied upon the written state-

ments of Mr. Mau in his letter to us and upon his oral representations to our representative, Mr. Wishnow, to the effect that he was involved in a matrimonial dispute and that he had the sum of \$12,500 in escrow but which was soon to be released upon court order.”

Signed, “I. Goldberg. Subscribed and sworn to before me this 8th day of July, 1949, before Ruth D. Budson, Notary Public in and for said County and State.”

Mr. Tenner: I would like the record to show that we make the motion to strike his answer to Interrogatory No. 24, if your Honor please, as it is a self-serving declaration, to-wit: “What, if anything, motivated you—”, which is purely speculative and based on——

The Referee: Wait a moment, counsel, have you read the law on that subject?

Mr. Tenner: Yes. I can quote your Honor authorities.

The Referee: The law is that the creditor must rely upon the statement made to him by the debtor regarding his financial condition, to make it subject to a ground for [63] opposing discharge. Why, in view of that, is this answer improper?

Mr. Tenner: I think it is improper for two reasons, your Honor.

The Referee: What is that?

Mr. Tenner: I think it is improper for two reasons, your Honor, and I am prepared to submit to the Court authorities.

The Referee: All right. Submit them right now. I will hear them, and we will see what they say.

Mr. Tenner: Quoting from *Corpus Juris Secundum*, page 745, a case therein cited—I quote back, referring to Note 813——

The Referee: I don't care what *Corpus Juris* says. Let us get the cases, themselves. What are they?

Mr. Tenner: I have—there were so many I didn't get them.

The Referee: What volume is that?

Mr. Tenner: It is under "Evidence". I just didn't write that down.

While she is getting that book, I would like to make a statement of my activity here this afternoon, both for the sake of future relationship with the Court and to explain my position. While it would seem that we have taken a position in which we have resorted to every possible technicality, I am not trying to apologize for that. I would like to tell [64] the Court why I have got to finish this job.

It appeared to me, upon a careful reading of this deposition, that one of two things was obviously true: That the person whose deposition was taken was either an attorney or one so well versed with attorneys' language that he picked up all their phraseology; or, that actually I. Goldberg, himself, never filled in these answers.

And the reason I came to that conclusion—I will

tell you why I did this, and I would like the record to show that we just didn't come here today to raise technical objections. I have very seldom in my life run across—perhaps it is a young life—run across a layman who will answer, for example, Question 22: "If such advices or reports were in writing, will you please attach the writing to this deposition and have the Notary Public mark it as Trustee's Exhibit No. 3 for identification?" And the answer: "I herewith turn same over for identification."

This gave me reason to think, and I went to the answer to Interrogatory 24, and the question isn't important, but this is the answer: "Because we relied upon the written statements of Mr. Mau in his letter to us and upon his oral representations to our representative, Mr. Wishnow, to the effect that he was involved in a matrimonial dispute and that he had the sum of \$12,500 in escrow but which was soon to be released upon court order."

And the answer to Interrogatory No. 21. I would say [65] that this Court has had more experience than I, but take 999 laymen out of a thousand and ask them Interrogatory No. 21, and I would like to know how many of them would answer, "Yes, as explained in Interrogatory No. 16."

This runs as a pattern——

The Referee: Counsel, would you like to take the deposition over again by oral testimony? I will permit you to do that, if you want to. Maybe that is the solution of this thing. We will let you go

there, either yourself or a qualified representative, and conduct the proceedings in behalf of your client.

Mr. Tenner: I would like to say this, sir——

The Referee: Just please answer me.

Mr. Tenner: I don't think our client has any money to enable us——

The Referee: I don't care whether he has any money or not. Do you want to do that? Yes or no?

Mr. Tenner: I don't think we can, your Honor. But the only reason I am making these statements to your Honor is that I would like your Honor to be familiar with my thought process, and the purpose of this is that I concluded, obviously, that this had not been done by Mr. Goldberg. I never heard of a layman who answers questions——

The Referee: After you have as much experience as Mr. Quittner and I have you will realize that as a young man you are sure of everything but as an older man you are not [66] sure of anything.

Mr. Tenner: Perhaps it is unsatisfactory, but I want to make that explanation.

The Referee: You have the privilege of taking this all over again, if you think it doesn't state true facts, and you can have all the time you need.

Now, I have Corpus Juris Secundum. Where is it?

Mr. Tenner: I would like to call your Honor's attention to page 745—No. 813.

The Referee: 32 C.J.S.

Mr. Tenner: Page 745. May I approach the bench?

The Referee: Just a moment. You are reading from *Corpus Juris*?

Mr. Tenner: *Corpus Juris Secundum*.

The Referee: Where are you reading from, the top of the page or where?

Mr. Tenner: It is Note 813.

The Referee: There is no Note 813. You take the original book.

Mr. Tenner: This is the rule (handing book to the Referee). This is the general rule.

The Referee: That is at page 745?

Mr. Tenner: Yes, sir.

The Referee: That reads Section 813 on page 745 out of 32 *Corpus Juris Secundum*: "The general rule is that where a fact to be proved is evidenced by writing, the original [67] writing is the best evidence, and a copy is not admissible."

I think there is no doubt about that.

Mr. Tobin: It doesn't say "photostatic copy."

The Referee: But that is the general rule.

Mr. Quittner: May I call your Honor's attention——

The Referee: Wait a moment. I am talking to Mr. Tobin now. But that is the general rule, anyhow.

Mr. Tobin: Yes.

The Referee: Then it goes on to state here: "Except where, as stated *infra* Section 837, the absence of the original is accounted for."

Let us see what 837 says. All right, now. What cases do you refer to?

Mr. Tenner: The cases cited for the general proposition under Note 813, and more specifically——

The Referee: Wait a moment. Note what?

Mr. Tenner: The cases under Note 813.

The Referee: You mean Section 813, not Note?

Mr. Tenner: Yes, sir. I beg your pardon. And more specifically, sir——

The Referee: I don't think there is any question about that. We will pass that. That is the law.

Mr. Tenner: May I just refer your Honor's attention to Section 815, which will answer Mr. Tobin's question on photostatic copies: "Although copies are secondary evidence and thus generally inadmissible——" [68]

The Referee: Well, that is probably so, unless they are identified, and Mr. Mau has identified, I think, all the photostatic copies as correct, except, of course, he wouldn't know about this one here where Goldberg apparently addressed something to a man named "Ellis". All the rest of them are either letters by Mr. Goldberg to Mr. Mau, identified by Mr. Mau and—wait—there is a photostat here of a communication from Mr. Mau to Mr. Goldberg, which I think hasn't been identified by Mr. Mau. I would like to get the evidence. If Mr. Mau hasn't got a copy of it, I told Mr. Tobin he could have whatever time is necessary to get the original from Mr. Goldberg.

Mr. Tobin: Might I say that I will put Mr. Mau on the stand now and ask him?

Mr. Quittner: If I may refer to the Court's records, I think Mr. Mau testified that even to the one letter received from Mr. Goldberg, from the so-called Mr. Goldberg, he was not familiar with his signature, and I would like to say——

The Referee: Do you mean to say that he testified he is not familiar with his signature?

Mr. Quittner: With Mr. Goldberg's signature.

The Referee: What?

Mr. Quittner: With Mr. Goldberg's signature.

Mr. Tobin: Mr. Mau, please take the stand.

The Referee: He got the letter. That is immaterial [69] whether he knew the man's signature or not.

Mr. Quittner: As to our objections, your Honor, to the use of these, without explaining why the originals were not used, the law is ample—that I have been able to find—that Rule 43——

The Referee: Let us not go into that. We are getting into a supertechnical area. Let us get down to the facts here.

JACK MAU

recalled, having been previously duly sworn, resumed the stand and testified further as follows:

Examination

By Mr. Tobin:

Q. Mr. Mau, I will show you a letter attached to the deposition of Mr. Goldberg, bearing a stamp "Received September 1, 1948," and written on the

(Testimony of Jack Mau.)

stationery of Jack Mau Clothes of Hollywood, and I will ask you to examine that and tell us if that is written in your handwriting?

A. Yes, it is. Yes, sir. Yes, sir, this is my letter.

The Referee: What is the answer?

Mr. Tobin: "Yes, that is my letter."

Mr. Tenner: We will make the same objection: The original hasn't been used.

The Referee: What difference does that make? He admits he wrote that. What difference does it make? Answer [70] me that, sir.

Mr. Quittner: I may be wrong here, sir, but I have always been of the opinion that it doesn't make any difference if you can identify secondary evidence. You must first explain——

The Referee: Your own client says he wrote that letter and that that is his signature. That is enough.

Q. (By Mr. Tobin): Now, you testified here that you received only one letter from Walbrooke Clothes, Inc., and that was Trustee's Exhibit No. 1?

A. I wouldn't know—what do you mean, the first letter that I wrote——

The Referee: You wrote the letter Mr. Tobin refers to?

The Witness: The letter I wrote in back of it?

Mr. Tobin: Yes.

The Referee: No. You asked him what letter he received. Wait until I get it, because I am

(Testimony of Jack Mau.)

certain that Mr. Mau is trying to tell us the facts right now, and let us have him quite sure of what he says. Let us see, where is that letter?

Mr. Tobin: Trustee's Exhibit No. 1.

The Referee: Here it is. Take Exhibit No. 1 and question him about it.

Q. (By Mr. Tobin): You testified earlier this afternoon that the only communication you had received from Walbrooke [71] Clothes was this letter of July 26th, Trustee's Exhibit No. 1?

A. That is right.

Q. Is that right? A. Yes.

Q. And on the back of Trustee's Exhibit No. 1 is your reply to that? A. That is right.

Q. What was this letter that was received by them September 1, 1948, and likewise a reply, too?

A. This is possible: Then when the money didn't materialize that I wrote him that the money didn't come through, and I spoke to Wishnow again, and Mr. Wishnow, through his direction, I wrote him the second letter, which I told him I would possibly send him a series of checks. It is very possible, from July to September, that I hadn't sent him any checks. It is very possible, from July to September, that I hadn't sent him any checks, and usually I would send my money, take a little more time by letter to Mr. Goldberg, and this is possibly the letter I sent to Mr. Goldberg as of July 26th. That I hadn't gotten to see him here—may I read this to the Court?

(Testimony of Jack Mau.)

The Referee: No. I will read it.

The Witness: It is self-explanatory that I wanted him, to send him a series of checks that he would know that I didn't receive the \$12,500, and it so states here, that he [72] did know I didn't get the \$12,500.

The Referee: Never mind what he did know and didn't know. Just tell us what you did.

The Witness: That is possible that I wrote him the second letter through the direction of Mr. Wishnow when the deal that I expected didn't go through.

The Referee: This was dated when?

The Witness: There is no date on it. The stamp is——

The Referee: Do you remember about when it was?

The Witness: I can't answer truthfully. I don't remember. I won't say.

The Referee: Apparently Mr. Goldberg's office stamp is "Received September 1, 1948."

The Witness: That is right.

The Referee: Does that refresh your recollection as to about when you sent the letter?

The Witness: If it is—that is when, because it must have been sent possibly a week or two or three days before that.

The Referee: Take a look.

The Witness: The stamp says, "Received September 1, 1948," so I generally sent air mail. It

(Testimony of Jack Mau.)

might have been two or three—it takes about three days for air mail, and it might have been three days before September 1st, because I know there was Labor Day in there.

The Referee: Mr. Tobin, go ahead. [73]

Q. (By Mr. Tobin): Calling your attention to the first paragraph of that letter: “I just got in this morning from a serious operation at the hospital. I am, indeed, grateful to you for your understanding cooperation to me.” What did you refer to in that letter, that sentence, “your understanding cooperation to me”?

Mr. Quittner: I object to that. Immaterial. Totally immaterial.

The Referee: What is that?

Mr. Quittner: I object to that. Immaterial, totally immaterial.

The Referee: Objection overruled. Maybe Mr. Mau has something to say about this. I would like to know what he had in mind when he wrote that.

The Witness: As I explained to the Court before, Mr. Wishnow and I had been pretty good friends. I bought this merchandise through Mr. Wishnow, through his New York concern. Every once in a while he said, “Jack, if you can’t send them any money, send them a letter. They are 3500 miles away from here. Tell them you will pay them a little. Let the man hear from you that you don’t mean to stall him off.”

So, possibly, through my connection—exactly as

(Testimony of Jack Mau.)

I say—the picture started to form from July, and this escrow didn't go through, and he had found it out. I had gotten very sick, which I can bring a certificate to court to show. [74] I had lost a lot of weight, been very sick. He says, "Write him a letter and tell him when."

I wrote him a letter at—as far as I know—right after Labor Day. I know things will pick up and be better then.

The Referee: Wait a moment. At that time, when you wrote this last letter here, the escrow had not gone through?

The Witness: Oh, it had not been gone through. That is right. This was in July——

The Referee: No. This letter was in September.

The Witness: Well, then the other letter was in July. It had been, possibly, a month and a half.

The Referee: When you wrote this letter in September, whatever the date is there, or thereabouts, had the escrow gone through or not?

The Witness: No, the escrow never went through.

Q. (By Mr. Tobin): Had it fallen through?

A. Yes, it never even materialized.

The Referee: When you wrote the second letter, why didn't you say something about the escrow hadn't gone through?

The Witness: May I say this: Honestly, I hadn't had a thought of the escrow before this defraud, the man that——

(Testimony of Jack Mau.)

The Referee: Just a minute. Can you give me any reason now, any explanation why you didn't mention the escrow in here if at that time you knew or had reason to [75] believe it hadn't gone through?

The Witness: Again, I took it for granted that Mr. Wishnow was my friend, and communicated with New York, and through our friendship, I wrote this letter, telling him that I would send them a series of checks. I have never had a check go bad——

The Referee: You don't answer my question. Can you give me an explanation of why you didn't mention the escrow in that letter? Say "No" and that ends it. If you can explain it here, explain it.

The Witness: Why I didn't mention it?

The Referee: Yes.

The Witness: I possibly didn't think that I had to mention the escrow in the letter before, taking for granted that Mr. Wishnow knew it had fallen through.

Q. (By Mr. Tobin): In the third paragraph of your letter you say, "I am going to send you a series of checks, but I am making sure that the checks are good. I haven't ever had a check go bad——"

Q. How were you going to make those checks good if the escrow had fallen through?

A. Well, I was doing business every day. It hadn't dropped down any more, and I thought if

(Testimony of Jack Mau.)

the man waited a few weeks, instead of sending a bad check back, I would put the money in the bank and then send a check and not send a check for five days, hoping it would come back, my check, [76] and then go back for another week. I never did that.

The Referee: Anything further?

Mr. Tobin: No, your Honor.

The Witness: That is the reason I explain that.

Examination

By Mr. Tenner:

Q. There are a few questions I would like to ask you, Mr. Mau. A. Yes.

Q. Do I understand from your testimony that between the time you sent your first letter to New York—I mean to New Jersey, telling them you had an escrow, and the second letter, I understand you knew the escrow was not going to go through?

A. Yes.

Q. And did I understand you that you told this to Mr. Wishnow? A. Yes.

Q. Their credit representative?

A. That is right.

Q. And he knew there was no escrow?

Mr. Tobin: No evidence here that Mr. Wishnow was their credit representative. He was their sales representative.

The Referee: Yes. That is true.

Mr. Quittner: If Mr. Wishnow was no representative—— [77]

(Testimony of Jack Mau.)

The Referee: He was an uncredited representative.

Mr. Quittner: But they relied in one breath on what Mr. Wishnow told them about the escrow, and at the same time——

The Referee: If something is said to a brakeman of a railroad, that doesn't bind the president. Go ahead.

Q. (By Mr. Tenner): What position did Mr. Wishnow have with the company, if you know?

A. He represents them—he has all the Western States as a salesman.

The Referee: What do you call that in the trade?

The Witness: A salesman. Years ago they used the word “drummer”, but he is a salesman, a representative on the West Coast.

The Referee: They used to have signs on doors, “Manufacturers' Agents.”

The Witness: “Manufacturers' Representative.” We have them out here now, and some men out here, they have offices, and they represent their manufacturers back East, but they travel.

The Referee: But what he was was a salesman?

The Witness: I would say he was Walbrooke's representative.

Mr. Tobin: The only objection I made was to the use of the words “credit representative.” The credit man was Goldberg.

The Witness: May I also inject a thing? I would say [78] this, that Mr. Wishnow said, “Don't

(Testimony of Jack Mau.)

worry about anything; if you haven't got a check, I will pay for it."

I happened to be very friendly with Mr. Wishnow, and I can understand his position, working for these people.

Mr. Tenner: I will reframe my question and leave out the words "credit representative."

Q. (By Mr. Tenner): You knew Mr. Wishnow handled the affairs of Walbrooke Clothes, Inc., in Los Angeles? A. Yes, I did.

The Referee: That is going too far. He doesn't know how many affairs they had. How do you know Wishnow handled their affairs, other than being salesman?

The Witness: He was intermediary between Walbrooke and myself, being their representative. I could talk to Wishnow and he would get me certain things under price, even. He was their representative.

The Referee: Just a representative to the extent of communicating to them what you told him?

The Witness: I know. He was also their representative to this extent: If there was a certain argument—for argument's sake—if a suit of clothes cost \$22, he could make a deal for \$19. He was their representative also for cutting prices a little bit if he wanted to.

Q. (By Mr. Tenner): Did anyone besides Mr. Wishnow ever represent Walbrooke in their relationships with you?

(Testimony of Jack Mau.)

A. Mr. Wishnow has been with them for the last 10 [79] years. That I know.

The Referee: Did anyone else ever ask you for this money?

The Witness: No.

Q. (By Mr. Tenner): Besides Mr. Wishnow?

A. No.

Q. At the time you knew that this escrow was not going to materialize at all did you so tell Mr. Wishnow?

A. Mr. Wishnow came in about two weeks later.

Q. And what did you tell him, to the best of your recollection?

A. "Ellis, my wife went off on a tangent again. She has cracked everything all to pieces."

He said, "Don't worry, Jack. You look like hell. You are going to collapse. Why don't you get up on your feet, because you will lose everything."

And I did lose, and I can verify it, for \$43,000 in less than six months.

Q. I mean concerning the escrow that had fallen through, what did you tell Mr. Wishnow?

A. "I can't do anything."

"I tell you what you do, Jack. Write to Mr. Goldberg again that, 'I appreciate your letter. As soon as a check comes here from a client,' it means you are not ignoring his letter. Then tell him what you will do."

Q. You do remember telling him that this deal had [80] fallen through?

(Testimony of Jack Mau.)

A. On my word of honor.

Mr. Tenner: That is all.

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Examination

By Mr. Tobin:

Q. Mr. Goldberg, the man you had written to, telling him there was \$12,500 in escrow, why didn't you tell the man you wrote that to?

A. Even these letters were always done at the bidding of Mr. Wishnow.

Q. Did Mr. Wishnow dictate this letter that—

A. Mr. Wishnow didn't dictate the first letter.

Q. But why didn't you tell Mr. Goldberg that the escrow had fallen through?

A. I had no intention of making a false statement in my first letter any more than I did in my second. My intention on the \$12,500 was \$1,000 I was to get, and nothing else.

The Referee: That is your explanation why you put that in there? Is that it?

The Witness: Yes.

Mr. Tenner: I would like to make some other statement. Maybe I am going—the knowledge of the agent would be knowledge of the principal.

The Referee: Knowledge of some brakeman isn't knowledge of the corporation or of the president. You have got [81] to show that the agent who got this knowledge is authorized to represent the corporation or the principal on the particular matter. That hasn't been done.

(Testimony of Jack Mau.)

The Witness: Your Honor, please don't misunderstand me. I am not an attorney.

The Referee: You may be glad you are not.

The Witness: I have only one thing to say, and that is true. During that letter of September 1st wouldn't Mr. Goldberg know that the escrow didn't go through? Isn't that self-explanatory?

The Referee: You are asking me now.

The Witness: I don't know.

The Referee: All right. Anything further?

Mr. Tobin: That is all.

Mr. Tenner: That is all.

(Witness excused.)

The Referee: All right, now, then. Here we are. Do you wish to take Mr. Wishnow's testimony?

Mr. Quittner: Mr. Wishnow is on the road?

Mr. Mau: He is not here too often. He is up and down the road. He takes Washington, Oregon—he takes all the Western States.

The Referee: How long do you think counsel should have to communicate with him?

Mr. Mau: I wouldn't know when he would be——

The Referee: Let us do it this way—— [82]

Mr. Mau: Can I say this? This is the fall season they start out now.

The Referee: Continue this matter for two weeks until we do get Wishnow. It is up to counsel to get him.

Now, Mr. Tobin, do you have to have any time to get the originals or the copies of the replies from Mr. Goldberg, particularly that "Ellis" thing?

Mr. Tobin: I think that he is always referred to as "Mr. Wishnow."

Mr. Mau: The gentleman is Ellis Wishnow.

Mr. Tobin: His first name is Ellis?

Mr. Mau: His name is Ellis Wishnow.

The Referee: This is a memorandum. It says: "To Ellis."

Mr. Mau: His name is Ellis Wishnow. I always talk to him by his first name, but his name is Ellis Wishnow.

The Referee: Then when we get Wishnow here we can examine him about this.

Mr. Mau: That is Ellis Wishnow.

The Referee: Unless Mr. Mau is mistaken, we don't need to communicate—let them bring that out with Mr. Wishnow.

Anything else that you want done to get Mr. Wishnow?

Mr. Tobin: Well, we will just have the Trustee run through any papers—

The Referee: I am going to give each side plenty of [83] time to produce whatever they think should be done.

Mr. Tobin: I think 30 days would be enough.

The Referee: Do you want to take this deposition all over again?

Mr. Tobin: No, your Honor.

The Referee: All right. From your point of view, do you want to take it over again?

Mr. Quittner: No. I was just going to say this, so that we can conclude this matter: We will permit that one letter that he has to produce as a photostatic copy, with our other objections as to hearsay. In other words, preserving that objection. In other words, we still want to preserve that objection to that letter from Goldberg to Wishnow as hearsay. That isn't pertaining to the other objections, but for that one letter, so the Court can conclude this matter and decide it or submit it, we will let that one letter in, that one letter alone.

The Referee: In other words, you want to demand the original?

Mr. Quittner: Yes, and we will, therefore, let the matter stand as submitted.

The Referee: It all comes down to the examination of Wishnow.

Mr. Quittner: Wishnow is a traveling man. He may be gone for months. Mr. Mau wants to rehabilitate himself and get started again, and we want to get the matter over with [84] today.

Mr. Tobin: Is counsel resting?

Mr. Quittner: You have to rest first.

Mr. Tobin: I have rested.

Mr. Quittner: You have? We rest. We want to dispose of the matter, if your Honor please.

The Referee: The matter is submitted?

Mr. Quittner: Yes, sir.

The Referee: Do you want to submit it on briefs?

Mr. Tobin: I do not.

Mr. Quittner: We will submit it to the Court.

The Referee: I don't know. Maybe the Court should have this written up, so the Court can be very careful about his decision. Is there any money in this estate?

Mr. Tobin: I don't know, myself, right now.

The Referee: Well, I don't know. I will mark it submitted, and then you endeavor to find out if there is any money in the estate so we can authorize——

Mr. Quittner: How much is there in the estate?

Mr. Mau: The stock was sold for \$1,100.

The Referee: It is for your protection to have it written up, Mr. Mau; otherwise, I will have to depend on my recollection in making the findings. And I may be all wrong, as Jesse James said one time in a similar matter.

In the absence of the reporter's transcript the Referee makes a summary of the evidence, or I could have each [85] one of you submit your summary, and connect it up the best I can out of the two summaries.

Mr. Tobin: If your Honor please, in connection with checking up the testimony, I find here in my file a letter of May 11th to Walbrooke Clothes, Inc., in which the second paragraph says: "We partly tried the objection to this man's discharge on May 10, 1949, but, of course, your local representative, Ellis Wishnow, could not testify to his own knowledge as to the effect of Mau's letter, in so far as forbearing to press the claim against him was concerned. The matter was therefore adjourned for a

period of approximately six weeks for the purpose of taking your deposition on the written interrogatories and cross interrogatories submitted by the attorney for the bankrupt."

So, it was partly tried on May 10th. That was the date Mau testified to here.

The Referee: The question is whether we should have the testimony that has been taken written up or should the Court do the best he can after receiving each side's version of the testimony, unless Mr. Mau wants to go to that expense.

Mr. Quittner: We don't have the money.

The Referee: Then you will have to depend on my recollection, which may be faulty, but I will give both of you a chance. I think what I had better do now is this: Supposing you give me your own version of what the evidence should be, submit it to the other side, and give them time [86] to check it and to submit theirs, and I will wrestle with it and do the best I can with it.

Mr. Tobin: Very well.

Mr. Tenner: Fine. Would your Honor set some kind of time limit, 10 days, 20 days?

The Referee: 10, 10, and 5.

Mr. Tobin: I don't know. I am going to trial in Judge Harrison's court Monday. I don't know how long it will take.

The Referee: Do you want to make it 15, 10 and 5?

Mr. Tenner: Something like that.

Mr. Tobin: Yes, your Honor.

Mr. Tenner: All right.

Mr. Tobin: I would like as much as 15 days, at least.

Mr. Tenner: That is plenty of time. Thank you, your Honor.

[Endorsed]: Filed Dec. 5, 1949 [87]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 41, inclusive, contain the original Debtor's Petition in Bankruptcy; Orders of Adjudication and of General Reference; Amended Specifications of Objection to Discharge of Bankrupt; Order Denying Discharge of Bankrupt; Petition for Review of Referee's Order by Judge; Trustee's Exhibit No. 1; Certificate of Referee on Review of Order Denying the Bankrupt a Discharge; Order Affirming Referee's Order; Notice of Appeal; Corrected Notice of Appeal; Statement of Points on Which Appellant Intends to Rely; and Designation of Record on Appeal and a full, true and correct copy of Minute Order Entered February 15, 1950, which, together with Reporter's Transcripts of Proceedings on May 10, 1949, and September 9, 1949, transmitted herewith, constitute the record

on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 11th day of May, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12546. United States Court of Appeals for the Ninth Circuit. Jack Mau, Appellant, vs. Paul W. Sampsell, Trustee in Bankruptcy of the Estate of Jack Mau, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California Central Division.

Filed May 12, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

JACK MAU,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy
of the Estate of Jack Mau, Bankrupt,
Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND
DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court; to Paul
W. Sampsell, Trustee in Bankruptcy Herein;
and to Craig, Weller & Laugharn, His Attor-
neys:

I.

Comes now the Appellant herein and formally
adopts as his Statement of Points on Which Appel-
lant Intends to Rely, the said Statement of Points
on Which Appellant Intends to Rely heretofore
filed in the District Court of the United States,
Southern District of California, Central Division,
in Bankruptcy No. 46,674-PH.

II.

Appellant hereby designates as those portions
of the record and proceedings to be included in the
record on appeal, the following:

1. Voluntary Petition (omitting schedules) filed
by the bankrupt herein November 15, 1948;

2. Order of Reference signed by the Hon. Paul J. McCormick November 15, 1948; and Order of Adjudication filed November 15, 1948;

3. Amended specifications of objections to Discharge of the Bankrupt, filed July 8, 1949;

4. Findings of Fact & Conclusions of Law on opposition to Discharge, filed November 4, 1949;

5. Order Denying Discharge of bankrupt, filed November 8, 1949;

6. Petition for Review of Referee's Order, filed November 17, 1949;

7. Referee's Certificate on Review, filed January 6, 1950;

8. Minute Order Affirming Referee, filed February 15, 1950;

9. Order affirming Referee's Order, filed March 2, 1950, and entered in Judgment Book 64, Page 713, on March 28, 1950;

10. Notice of Appeal, filed March 13, 1950;

11. Corrected Notice of Appeal, filed April 3, 1950;

12. Exhibit I introduced into evidence by the Trustee;

13. Reporter's Transcript of Proceedings at hearings on Objections to Bankrupt's Discharge on May 10, 1949, and September 9, 1949, heretofore filed with the District Court of the United States,

Southern District of California, Central Division,
in Bankruptcy No. 46,674-PH.

14. Clerk's Certificate.

Dated: May 12, 1950.

QUITTNER, STUTMAN &
SHUTAN,

By /s/ FRANCIS F. QUITTNER,
Attorneys for Appellant.

[Endorsed]: Filed May 15, 1950.

No. 12546.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK MAU,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate
of Jack Mau, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

QUITTNER, STUTMAN & SHUTAN,
639 South Spring Street, Los Angeles 14,
Attorneys for Appellant.

JACK TENNER,
Of Counsel.

JUL 24 1950



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No. 12206

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

JACK MAU,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate
of Jack Mau, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

Jurisdictional Statements.

Appellant filed a voluntary petition in bankruptcy in the District Court of the United States, Southern District of California, Central Division, on November 15, 1948 [R. 2, 3, 4] and was adjudicated a bankrupt on November 15, 1948, by an order of adjudication and of general reference on November 15, 1948 [R. 4 and 5].

Thereafter, Amended Specifications of Objections to the Discharge of the Bankrupt were filed by the Trustee on July 8, 1949 [R. 6 to 9].

Evidence was offered in support of Specification No. I on the 10th day of May, 1949, and on the 9th day of

September, 1949, and the Referee filed Findings of Fact and Conclusions of Law on Objection to Discharge on the 4th day of November, 1949 [R. 9 to 13].

There was an order entered on the eighth day of November, 1949, denying the discharge of the bankrupt [R. 13 and 14].

A petition for review of the Referee's order by the district judge was signed on the 17th day of November, 1949 [R. 14 to 20] which review was denied and the Referee's findings and orders sustained by order of Judge Pierson M. Hall, signed the 2nd day of March, 1950, and entered in Judgment Book 64, page 713, on the 28th day of March, 1950 [R. 32 and 33].

This appeal is taken from the Judgment and Order of the Court adopting the Findings of Fact and Conclusions of Law of the Referee and the Order denying the Bankrupt's Discharge.

Within the time allowed by law, your appellant filed a Notice of Appeal, to-wit, on the 13th day of March, 1950 [R. 34] and further, a Corrected Notice of Appeal was filed on the 28th day of March, 1950 [R. 35]; and your appellant has taken the steps required by law in presenting the necessary record on the within appeal.

The jurisdiction of the Court of Appeals is invoked pursuant to Sections 24 and 25 of the Bankruptcy Act (Act of July 1, 1898, as amended, Ch. 541, Secs. 24 and 25, 30 Stat. 533, as amended).

Appellate jurisdiction over this proceeding in bankruptcy vested in the Court of Appeals upon the filing on the 28th day of March, 1950, of the Corrected Notice of Appeal, the appeal being taken by the bankrupt.

II.

Statement of the Case.

This appeal is from an order of the District Court entitled "Order Affirming Referee's Order" dated and entered on the 2nd day of March, 1950 [R. 32, 33]; that order in turn approves and adopts the order of the Referee in Bankruptcy dated and entered on the 8th day of November, 1949 [R. 13 and 14]. The facts in this case are in the main uncontradicted and they are essentially as follows:

That on or about the 22nd day of April, 1948, the bankrupt herein purchased merchandise from Walbrooke Clothes, Inc., in the sum of \$730.92; that the terms of the bill were net 60 days and that on or about the 26th day of July, 1948, Walbrooke Clothes, Inc., directed a letter to the appellant herein, requesting payment of the said obligation [R. 42].

That on or about the 29th day of July, 1948, Ellis Wishnow, the local representative of the said Walbrooke Clothes, Inc., called on the appellant herein to discuss the payment of the said obligation [R. 36 and 37]; that pursuant to the request of the said Ellis Wishnow [R. 38], the appellant herein wrote the said Walbrooke Clothes, Inc., and that the contents of the said communication of appellant are set forth as Appellee's Exhibit No. 1 [R. 40 and 41].

That prior to the communication of the 26th day of July, 1948, the said Ellis Wishnow never had occasion to call on the appellant herein for the payment of this obligation [R. 37]; and further that this was the first contact that was ever made for the collection of this past due

debt [R. 43] ; and further that the said Walbrooke Clothes, Inc., never communicated by any form their position with regard to this said Appellee's Exhibit No. 1.

It is further undisputed that the said obligation was never paid by the appellant herein and that there was in fact no escrow containing the sum of \$12,500 under the control of the appellant herein, or in any sum, or at all.

That subsequent to the appellant's communication, as set forth in the Appellee's Exhibit No. 1, the appellant herein never received any further communication with regard to the payment of this sum; that there was never any threat regarding the institution of any legal proceedings to collect the said sum, nor indeed was any such action threatened; nor was there ever an attachment levied against any of the property or assets of the appellant herein.

That the appellant's uncontradicted testimony was, and his explanation of the figure "\$12,500 in escrow" is adequately explained in the record [R. 88 to 91] and does not solicit any explanation at this point.

That the appellee herein filed Amended Specifications of Objections to the Discharge of the Bankrupt [R. 6 to 9] and more particularly Specification No. I in which it is alleged that the said Walbrooke Clothes, Inc., "refrained from pressing payment of the said debt" [R. 7 and 8] and that the said refraining from pressing payment was an act within the perimeter of Section 14(c)(3) of the Bankruptcy Act, for which the Court order denied the discharge of the appellant herein.

III.

Specification of Errors.

THE ORDER OF THE UNITED STATES DISTRICT COURT, AFFIRMING THE REFEREE'S ORDER [R. 32] DENYING THE BANKRUPT'S DISCHARGE, IS ERRONEOUS IN THAT:

(1) The finding of fact and conclusions of law signed by the Referee herein was induced by an erroneous view of the law in the following respects:

(a) In finding that the letter written by the bankrupt to I. Goldberg, Credit Manager for Walbrooke Clothes, Inc., and heretofore introduced into evidence as Trustee's Exhibit "1" is a materially false statement in writing respecting his financial condition, within the meaning of Section 14(c)(3) of the Bankruptcy Act.

(b) In finding that Walbrooke Clothes, Inc., gave an extension or renewal of credit within the meaning of Section 14(c)(3) of the Bankruptcy Act by merely "refraining from placing said account against said bankrupt, held by the said Walbrooke Clothes, Inc., for collection, refrained from suing on the same or pressing the same further in any manner whatsoever until it became necessary for the said Walbrooke Clothes, Inc., to file its claim in this bankruptcy proceeding as a result of the bankrupt's ensuing bankruptcy" [R. 12].

(2) The objections to all findings of fact herein complained of are further based upon the lack of evidence to support the same.

(3) The conclusions of law contained in the said Findings of Fact and Conclusions of Law are contrary to the law and the facts.

(4) The Court erred in refusing to grant the bankrupt a discharge.

IV.

Summary of Argument.

A. A FALSE STATEMENT ON WHICH A BANKRUPT OBTAINS MONEY OR PROPERTY ON CREDIT, WHICH WILL BAR HIS DISCHARGE UNDER SECTION 14(c)(3) OF THE BANKRUPTCY ACT, MUST BE A FINANCIAL STATEMENT AS DISTINGUISHED FROM A MERE MISREPRESENTATION.

(1) A DECISION OF A CREDITOR TO EXTEND OR RENEW CREDIT, THOUGH INDUCED BY A FALSE STATEMENT, CANNOT BE THE BASIS FOR THE DENIAL OF THE DISCHARGE, UNLESS SUCH STATEMENT BE A FINANCIAL STATEMENT AS DISTINGUISHED FROM A MERE REPRESENTATION.

B. THE INACTIVITY OF A CREDITOR AS WITNESSED BY HIS REFRAINING FROM PLACING AN ACCOUNT WITH A COLLECTION AGENCY OR PRESSING THE SAME FOR PAYMENT IN RELIANCE UPON THE DEBTOR'S REQUEST FOR CONSIDERATION OF HIS PERSONAL PROBLEMS IS NOT AN EXTENSION OR RENEWAL OF CREDIT WITHIN THE MEANING OF SECTION 14(c)(3) OF THE NATIONAL BANKRUPTCY ACT.

(1) THE 1926 AMENDMENT TO THE NATIONAL BANKRUPTCY ACT, AND IN PARTICULAR THOSE CHANGES IN SECTION 14(c)(3) WERE NOT INTENDED TO CREATE ANY NEW ACT OR ACTS WHICH COULD BE THE BASIS FOR THE DENIAL OF A DISCHARGE.

(2) THE PROVISIONS OF THE SECTION RELATING TO THE DISCHARGE OF A BANKRUPT ARE TO BE LIBERALLY CONSTRUED IN FAVOR OF THE BANKRUPT AND ARE NOT TO BE EXTENDED BY JUDICIAL CONSTRUCTION.

C. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE REFEREE AND ADOPTED BY THE JUDGE OF THE UNITED STATES DISTRICT COURT ARE NOT SUPPORTED BY, AND ARE CONTRARY TO, THE EVIDENCE.

V.

ARGUMENT.

Introduction.

The instant appeal raises questions of extreme importance to the administration of the bankruptcy law. It is well settled that the sections dealing with a bankrupt's discharge are to be liberally construed in favor of the granting of the same. This rule of law is many times cited but often overlooked by the courts when applied to a factual situation.

The factual situation here is a simple one. The appellant purchased merchandise on sixty days' credit from Walbrooke Clothes, Inc. Thereafter, when the invoice matured, the creditor requested payment. The creditor's sales representative called on the debtor and requested the said debtor to communicate his difficulties to the creditor. The debtor did so in a letter patently lacking in literary quality and definiteness, and the creditor's conduct from this point was notable only by its consistency of inaction.

This Court, and the courts below, have been asked to determine whether or not the factual situation presented in the form of a letter by the appellant herein was a statement respecting the financial condition of the appellant within the meaning of Section 14(c)(3) and the conduct of the creditor was that of extending or renewing credit.

This Court is familiar with the settled rule of law calling for a liberal construction of the sections of the Bankruptcy Act concerning itself with the discharge of bankrupts in an effort to grant the same.

Appellant submits that in both problems hereinabove posed, the Referee and the Judge of the United States

District Court failed to give the Bankruptcy Act the liberal interpretation required.

Appellant will address itself in this brief to both phases of the problem posed in the appellant's communication on their merits. However, emphasis will also be placed on the evidence submitted to the Referee to show a lack of fraudulent intent as applied to the appellant herein.

A. A False Statement on Which a Bankrupt Obtains Money or Property on Credit, Which Will Bar His Discharge Under Section 14(c)(3) of the Bankruptcy Act, Must Be a Financial Statement as Distinguished From a Mere Misrepresentation.

(1) A DECISION OF A CREDITOR TO EXTEND OR RENEW CREDIT, THOUGH INDUCED BY A FALSE STATEMENT, CANNOT BE THE BASIS FOR THE DENIAL OF THE DISCHARGE, UNLESS SUCH STATEMENT BE A FINANCIAL STATEMENT AS DISTINGUISHED FROM A MERE REPRESENTATION.

Assuming that there was an extension or renewal of credit, appellant's statement was only a representation as distinguished from a financial statement (see *In re Noble*, 42 Fed. Supp. 684; Remington on Bankruptcy, Sec. 3335).

The property must have been obtained on credit. The mere obtaining of money or other property by false representations, where the money was not loaned or credit otherwise extended, is insufficient to constitute a bar to discharge.

“The statement contemplated by the provision of the Act here involved is a financial statement, as distinguished from a mere representation. Stated other-

wise, to justify refusal of a discharge, the false statement must concern the financial condition of the bankrupt."

8 *Corpus Juris Secundum*, pages 1425-26 (citing *Johnston v. Johnston*, 63 F. 2d 24, 22 A. B. R. (N. S.) 340, affirming *In re Johnston*, 2 Fed. Supp. 443, and others);

In re Morgan, 267 Fed. 959, 45 A. B. R. 612.

"It is plain that the intention of Congress was not to extend the statute to all cases of false written statements where credit happens to be given, and the thought being to confine the statute to cases where the decision to give credit was induced by the false statement. SUCH STATEMENT MUST BE A FINANCIAL STATEMENT, AS DISTINGUISHED from a mere misrepresentation." (Emphasis ours.)

In re Morgan (supra).

The elements which must be met to appear to justify a final discharge on this ground are that the bankrupt has obtained money or property on credit on the basis of the materially false *financial* statement or statement as to the bankrupt's financial condition in writing given to the creditor or his representative for the purpose of obtaining credit *on which the creditor relied in granting credit*.

"The phrase 'respecting his financial condition' limits and restricts the false statement, which may defeat the discharge. In short, the false statement must be in respect to the bankrupt's financial condi-

tion. Even before the amendment to this subdivision, the Courts had given the term 'materially false statement' a narrow meaning."

In re: Current 63 F. 2d 640, 641, 23 A. B. R. (N. S.) 29, 31, reversing 59 F. 2d 460, 21 A. B. R. (N. S.) 477.

In *In the Matter of Acme Upholstery Supply Company, also known as Acme Upholstery Fabrics & Supply*, No. 45,232-PH, Referee Benno M. Brink in a decision rendered May 7, 1948, held:

"That a schedule of accounts receivable involved in this matter was not a statement respecting financial condition of the bankrupt partner within the meaning of Section 14(c)(3) of the Bankruptcy Act."

In a recent decision in this circuit, before the Honorable David B. Head, *In the Matter of Joseph F. Langan*, No. 46,283-O'C, the question presented to the Court was whether there was a false representation by the bankrupt which constituted a "false statement in writing concerning his financial condition." In an erudite decision the Court reviewed very thoroughly the important cases, prior and subsequent to the 1926 Amendment, and cited and approved *Johnston v. Johnston* (*supra*), and *In re Morgan* (*supra*). The *Morgan* case was again cited and approved in the case of *Lockhart v. Edel, et al.*, 23 F. 2d 912, 11 A. B. R. (N. S.) 187, page 190, wherein the Court said:

"A financial statement on which the bankrupt obtained money on credit which will bring the debtor under Bankruptcy Act, Section 14(b)(3) must be a financial statement as distinguished from a mere representation."

In re Morgan (*supra*).

A very important decision on the effect of the 1926 Amendment is the case of *Levy v. Industrial Finance Corporation, et al.*, 276 U. S. 281, 11 A. B. R. (N. S.) 352. In this particular case, the Court declared in a decision rendered by Mr. Justice Holmes that the 1926 Amendment did not apply because of the date of the proceedings. However, most significant is the language contained on page 354 wherein the Court said:

“The latter amendment, by the Act of May 27, 1926 . . . serves to limit the bars to discharge more narrowly and indirectly to favor the defendant’s position by a change of the words to ‘materially false statement respecting his financial condition.’ ”

It is therefore most important to remember that the 1926 Amendment, as the United States Supreme Court declared, was not intended to make it harder to get a discharge but, rather, was intended to provide greater limitations and restrictions on persons asking to have the discharge denied.

It has been argued by the appellee that the appellant’s reply to the creditor [R. 40, 41], induced the said creditor to extend or renew credit and that this extension or renewal was granted because of the inaction of the creditor. The Court’s attention is specifically directed to the said exhibit and its content. It is obvious from even a cursory examination that the quality of the said letter is not of the material from which great pieces of literature are born. Contrary to anything that has been argued heretofore, this letter clearly shows a bad financial condition rather than

one which would induce a creditor to extend or renew credit as the result of the meaning conveyed.

A comparable situation, where a discharge was granted, was presented to the Court in the case of *Dave Rauch v. Manchester Smith Company, Inc.*, 240 Fed. 687, 39 A. B. R. 484. Here the bankrupt wrote a letter to a creditor nearly six months before the filing of the petition in which he stated that he was

“perfectly solvent . . . One can hardly realize how conditions are here; in fact, there has been no business hardly at all, and for that reason I have been so pushed. Have just gotten possession of a bankrupt stock, and while I haven’t done anything yet, I expect to realize some money out of it. In regard to the order I gave, am not in need of the goods now and you can just hold same for a while yet, and in the meantime I am looking for things to open up.”

In *Dave Rauch v. Manchester Smith Company, Inc.* (*supra*), the Court held at pages 485-486 that all of the statements of the letter must be taken together and the intent of the writer inferred from its entire contents:

“Not only is there no definite representation as to assets or debts, or anything else, but the general assertion of solvency is so qualified by succeeding statements as to deprive it of any seriously misleading import. In short, we think the letter furnishes no evidence of that dishonest purpose to obtain credit which the law declares shall operate to prevent a

discharge. *Franklin v. Monning Dry Goods Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 257, 217 Fed. 929, 133 C. C. A. 601; *Peck Co. v. Lowenbein* (C. C. A., 4th Cir.), 24 Am. B. R. 138, 178 Fed. 178, 101 C. C. A. 498; *In re Cloutier Bros.* (D. C., Me.), 36 Am. B. R. 319, 228 Fed. 569; *Doyle v. First Nat. Bank of Baltimore* (C. C. A., 4th Cir.), 36 Am. B. R. 331, 231 Fed. 649, 145 C. C. A. 535."

In the approach to the question as to whether or not the creditor's conduct, to-wit his inaction was an extension or renewal of credit within the meaning of Section 14(c) (3) of the National Bankruptcy Act, an analagous situation is raised by Section 17(2) of the National Bankruptcy Act:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts whether allowable in full or in part, except such as . . . are liabilities for obtaining money or property by false pretenses. . . ."

The cases which most sharply raise the issue as to when the fraud must occur in order that it be classified as non-dischargeable debt have in the main been situations where subsequent to the discharge in bankruptcy the creditor sued on the obligation and the defense of the discharge in bankruptcy was raised and the issue before the Court was then one as to whether or not this was a debt which arose by obtaining money or property by false pretenses. Succinctly, the question posed was as to when the fraud would have to have been committed, in order that the debt be non-dischargeable. The authorities have consist-

ently held that the fraud would have to occur at the time that money or property was obtained.

See *Gerdau Co. v. Radway*, 225 N. Y. Supp. 284, 285, 11 A. B. R. (N. S.) 263, 267.*

See also *Matter of Blakesley*, 27 Fed. Supp. 980, 40 A. B. R. (N. S.) 517, 518:

“The special master found as a fact that the creditor sold an automobile to the bankrupt, and after its delivery, and after having secured a note therefor by a chattel mortgage thereon, the creditor then obtained a financial statement from the bankrupt. The special

*“We find that the defendant obtained the canary seed from the plaintiff upon an agreement to pay the purchase price from the letter of credit furnished by the purchaser. This transaction whereby the canary seed was obtained by the defendant was complete in itself and there is no allegation of fraud in connection therewith. Thereafter, by false representations, the defendant persuaded the plaintiff to cancel the aforesaid agreement to pay from the letter of credit, and to substitute the ninety-day trade acceptance. *But this latter agreement did not bring any property into the possession of the defendant.* The defendant already had the canary seed lawfully in his possession. The complaint thus fails to allege that the defendant obtained the possession of property from the plaintiff by fraud. Hence the obligation is dischargeable in bankruptcy as not within the exception of the Bankruptcy Act, namely a fraud, the result of which is the obtaining of property by false pretenses or false representations. In *Landgraf v. Griffith*, 41 Ind. App. 372, 83 N. E. 1021, the Court said: ‘We are of the opinion that the facts set out in the complaint are not such as are contemplated by the statute. The fraud should relate to the obtaining, at the *creation* of the debt, of the money or property by false or fraudulent representations, the original relation between the parties being a contractual one. It “must exist in the creation of the debt, as subsequent fraudulent conduct is insufficient.” *Brandenburg, Bankruptcy* (3d Ed.), §435. “If the original debt arose in contract and the fraud was but an incident of the debt and not its creative power, the debt is merged in the judgment and the bankrupt released thereafter.” *Brandenburg, Bankruptcy* (3d Ed.), §435. See also, *Collier, Bankruptcy* (5th Ed.), p. 478.’” (Emphasis ours.)

master further found that the bankrupt not only made a statement of his then indebtedness in good faith, but that it was substantially correct at the time made. The evidence as reported by the special master supports these findings of fact. The law is such that the discharge of the debt is not prevented by fraudulent representations made after the goods were purchased and delivered. *Otto Gerdau Co. v. Radway*, 11 Am. B. R. (N. S.) 264, 222 App. Div. 107, 225 N. Y. S. 284, 285."

B. The Inactivity of a Creditor as Witnessed by His Refraining From Placing an Account With a Collection Agency or Pressing the Same for Payment in Reliance Upon the Debtor's Request for Consideration of His Personal Problems Is Not an Extension or Renewal of Credit Within the Meaning of Section 14(c)(3) of the National Bankruptcy Act.

(1) THE 1926 AMENDMENT TO THE NATIONAL BANKRUPTCY ACT, AND IN PARTICULAR THOSE CHANGES IN SECTION 14(c)(3) WERE NOT INTENDED TO CREATE ANY NEW ACT OR ACTS WHICH COULD BE THE BASIS FOR THE DENIAL OF A DISCHARGE.

Section 14(c)(3) provides for a situation in which the discharge of the bankrupt will not be granted:

"The Court shall grant the discharge unless satisfied that the bankrupt has obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition."

A short history of the Bankruptcy Act, with particular emphasis on this section should be helpful in the consideration of this problem.

In the Bankruptcy Act of 1898, there was no section comparable in any manner with the now present and existing Section 14(c)(3). Clause (3) was added by Act of February 5, 1903. (32 Stat. 797 and in its original form read: "(3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit.") By Act of June 25, 1910, 36 Stat. 838, it was amended as follows: "(3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person." It was finally amended to read as in the text by Act of May 27, 1926, 44 Stat. 662, as follows: "obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition."

In view of this legislative history, the courts have consistently held that the import and consequences of this section should not be extended by judicial construction (see Collier on Bankruptcy, 14th Ed., Vol. 1, p. 1356, and cases cited).

It has been argued by the appellee in the courts below that the 1926 Amendment to the Bankruptcy Act was intended to provide for the instant situation in that the Congress added the phrase "obtained an extension or a renewal of credit." It is the position of the appellant that this was not the intention of the 1926 Amendment but rather that the said enactment intended to cover situations

where a debtor made or published a financial statement to credit agencies as distinguished from presenting it to an individual creditor. This phase of the amendment is found in the language of "making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing."*

The authorities hereinabove set forth prove conclusively and without any reservation that the 1926 Amendment to Section 14(c) of the Bankruptcy Act was promulgated with only one purpose in mind; as set forth in the statement by Mr. Michener.

*[See 67 Congressional Record 7526: Report of the Special Committee on Practices in Bankruptcy. The statement of Mr. Michener who explained the reasons of the various 1926 amendments during the debate on the floor of the Congress said: "The commerce of today is transacted almost entirely upon credit. Under present law a false financial statement to be grounds for denying a discharge must be given directly to the complaining creditor or his representative. *The amendatory provision serves to prevent those evasions of law which now occur by having the false statements made to and distributed by commercial agencies.*" (Our emphasis.) See also, 50 Am. Bar Assn. Reports 478, 484. Ralph F. Colin: "An Analysis of the 1926 Amendment to the Bankruptcy Act." (26 Col. Law Review 789-795.) The addition of the clause, "or obtain an extension or renewal of credit by making or causing to be made or published in any manner whatsoever . . . respecting his financial condition" merely codified the case law and the judicial constructions placed on the section as it read prior to the Amendment. See James Angell McLaughlin: "Amendments of the Bankruptcy Act"; 40 Harvard Law Review 341-351; *Ralph F. Colin, supra*; *In re Waite* (D. Md., 1915), 233 Fed. 853; *aff'd Doyle v. 1st National Bank of Baltimore* (C. C. A. 4th, 1916), 231 Fed. 649; *In re Samet* (D. Md., 1917), 243 Fed. 303; *aff'd Samet v. Farmers and Merchants National Bank* (C. C. A. 4th, 1917), 247 Fed. 669. *Morton v. Snyder*, 20 F. 2d 469; 10 A. B. R. (N. S.) 194.

Even before the Amendment of 1926, the obtaining of an extension of time for payment by false property statement was ground for the denial of discharge. See *Parrish v. City National Bank of Kearney* [C. C. A. Neb. (1929), 32 F. 2d 982; 14 A. B. R. (N. S.) 177. See also *Erickson v. Bicknell* (C. C. A., 1928), 28 F. 2d 729, 12 A. B. R. (N. S.) 639.]

- (2) THE PROVISIONS OF THE SECTION RELATING TO THE DISCHARGE OF A BANKRUPT ARE TO BE LIBERALLY CONSTRUED IN FAVOR OF THE BANKRUPT AND ARE NOT TO BE EXTENDED BY JUDICIAL CONSTRUCTION.

Appellant desires to recall to the attention of the Court the historical interpretation both legislative and judicial of the section dealing with the Discharge of Bankrupts. This interpretation has never varied in its consistency in the proposition that legislation dealing with this subject should always be interpreted liberally in favor of granting of the discharge to the bankrupt (see Remington on Bankruptcy, Sec. 3216 and the cases therein cited).

However, appellant submits that the construction of the Bankruptcy Act by the courts below for the reasons hereinabove stated are repugnant to the philosophy of a liberal construction of the Bankruptcy Act in favor of the granting of a discharge to the appellant herein. Indeed, appellant suggests that on the two legal issues hereinabove raised, the most exacting judicial construction was necessary in order to sustain a finding that the appellant's discharge should be denied and that this construction was erroneous.

C. The Findings of Fact and Conclusions of Law Made by the Referee and Adopted by the Judge of the United States District Court Are Not Supported by, and Are Contrary to, the Evidence.

The Findings of Fact and Conclusions of Law [R. 10 to 12] can be summarized very briefly. They are to the effect that the local representative of Walbrooke Clothes, Inc., to-wit: Ellis Wishnow, called on the appellant herein

to inquire about the payment of the obligation and that as a result the said Ellis Wishnow and the appellant herein had conversation [R. 11] concerning the indebtedness, which led to the appellant herein writing a letter to Walbrooke Clothes, Inc. [App. Ex. 1]; that as a result of the said letter, said Walbrooke Clothes, Inc., "refrained from placing said account against said bankrupt, held by the said Walbrooke Clothes, Inc., for collection; refrained from suing on the same or pressing the same further in any manner whatsoever" [R. 12].

Appellant is aware that appellate courts are reluctant to disturb Findings of Fact when they are based on evidence presented to the lower tribunals. However, we submit that the error committed by the lower courts regarding its finding of fact and conclusions of law are so obvious and so contrary to the elementary rules of the fair exercise of discretion that this Court should examine into the same.

The representative of Walbrooke Clothes, Inc., testified that he had never had previous occasion to call on the appellant herein for the payment of the said indebtedness [R. 37]; that on the basis of his discussion with the appellant herein, his only communication to Walbrooke Clothes, Inc., was that the appellant "would probably pay it because he told me he would" [R. 38].

There was testimony that the letter dated July 26, 1948, was the first communication ever addressed to the appellant herein concerning this delinquency [R. 42]. Indeed, it may be commented here that the appellant herein was only delinquent thirty days. There was further testimony again

by the sales representative of the said Walbrooke Clothes, Inc., that after the appellant herein had written the said Walbrooke Clothes, Inc. [Appellee's Ex. I] that nothing was done regarding its contents either verbally or in writing [R. 48].

The testimony of the appellant herein further corroborated the testimony of Mr. Wishnow that the letter of Walbrooke Clothes, Inc., of July 26, 1948, was the first communication he had ever received from the Walbrooke Clothes, Inc. [R. 92].

There was further testimony that the letter was never answered; that there was no subsequent communication; that there was never any attachment nor any threat as to the institution of legal proceedings to collect the same [R. 92].

We may now very well direct our attention to the very core of the problem: The use of the phrase "\$12,500 in escrow to be released to me as soon as we can get the Court Order" as predicated in the Findings of Fact and Conclusions of Law, heretofore entered by the courts below, would have us believe that the appellant conjured up this figure and the whole concept of money coming to him from an escrow.

It might very well be said that the appellant in writing to the said Walbrooke Clothes, Inc., did not chose the most qualified literary vein in which to travel. The explanation is not difficult. It is actually very simple. The appellant's uncontradicted testimony [R. 88 to 91] can be summarized

as follows: The escrow of which the appellant speaks was to have resulted from the negotiations which the appellant was conducting with Mr. Dean, Vice-President of the Main Office Branch of the Bank of America. The total escrow was to be in the sum of \$12,500, of which the Bank of America would retain \$11,500 as its security for the first and second mortgages and the appellant would receive \$1,000 as his proceeds from the said escrow and that this money would be used to extinguish his liability to Walbrooke Clothes, Inc. That was the testimony and those are the facts—simple in form, truthful in content, and uncontradicted in presentation. The only possible interpretation to support the position of the appellee as would be that these entire negotiations with the Bank of America were a figment of appellant's imagination and even the appellee below did not attempt to contradict the testimony of the appellant.

If the appellant had said "there will be \$12,500 in escrow" as distinguished from "there is \$12,500 in escrow" this case would undoubtedly never have arisen and when the issues in this matter have been presented to the Court in their totality, the factual question is one of improper phraseology in appellant's communication.

We suggest that it was to protect debtors in just such a situation that the rule of law, that a financial statement must be relied on by the creditor as distinguished from just any representation, has been enunciated by the courts.

VI.

Conclusion.

The principal points involved in this appeal are:

(1) Was the appellant's letter a materially false statement in writing respecting his financial condition within the meaning of Section 14(c)(3) of the National Bankruptcy Act?

(2) Was the conduct of Walbrooke Clothes, Inc., that is to say its inactivity as related to the appellant herein, an extension or renewal of credit within the meaning of Section 14(c)(3) of the National Bankruptcy Act?

(3) Were the Findings of Fact and Conclusions of Law, as set forth by the Referee and adopted by the Judge of the United States District Court below, based upon evidence sufficient to support the same?

We submit that these questions can only be answered in the negative and further that a liberal interpretation of the sections dealing with the Discharge of a Bankrupt require that the Order Denying the Bankrupt's Discharge should be reversed and we respectfully submit that the bankrupt should be granted his discharge.

Respectfully submitted,

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Of Counsel.

No. 12546.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK MAU,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate
of JACK MAU, Bankrupt,

Appellee.

BRIEF OF APPELLEE.

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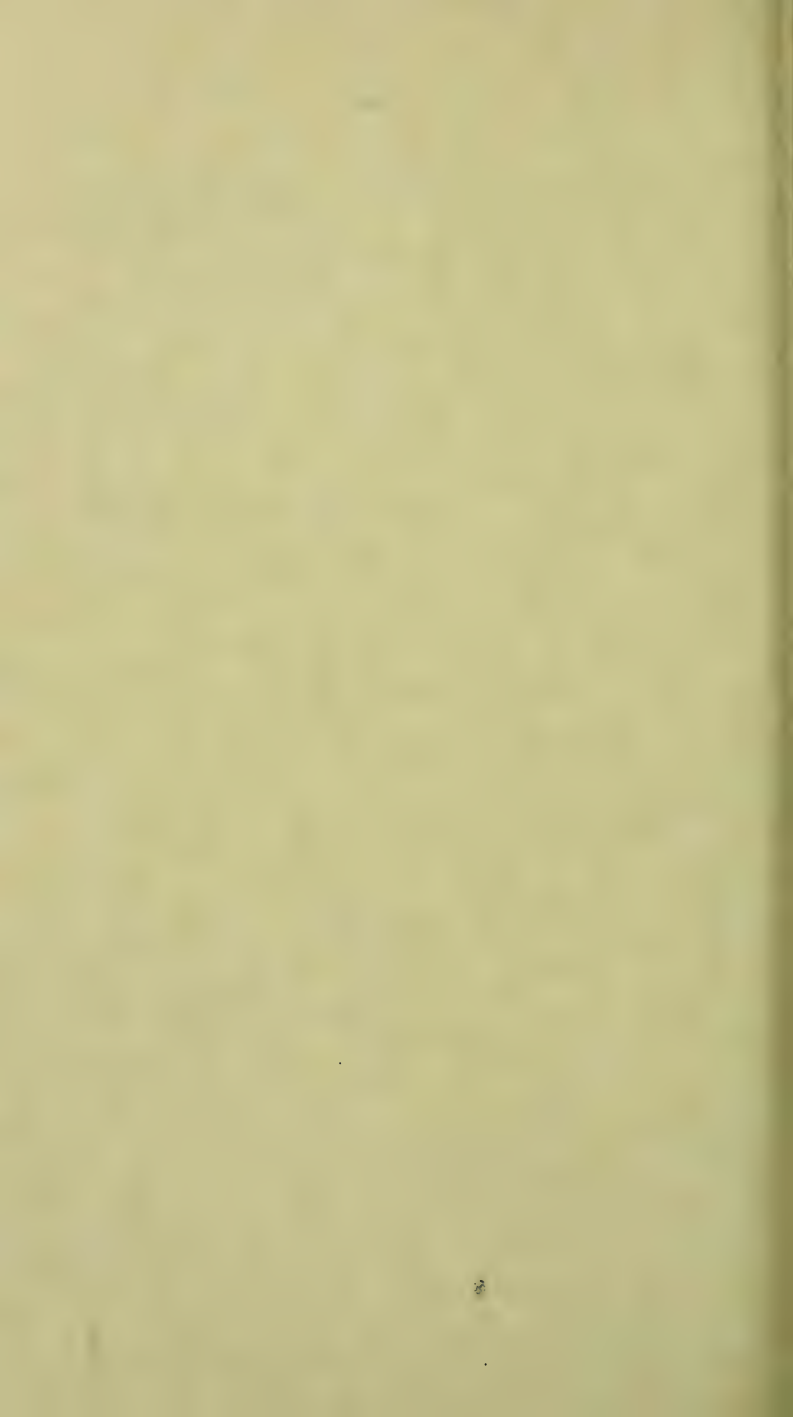


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BRIEF OF APPELLEE.

The issues before this Court in this matter are very simple. Jack Mau, the bankrupt, was engaged in the haberdashery business in Los Angeles. He was buying merchandise extensively on credit and apparently was operating more or less on a shoestring with bankruptcy as the inevitable result. The situation was further complicated by domestic difficulties with his wife and divorce proceedings were pending in the Superior Court. Mau owned a home in Hollywood which was heavily encumbered, the amount of the encumbrance approximating \$11,500.00 [Tr. p. 89]. There had been some verbal negotiations between the bank, Mrs. Mau, and the bankrupt with regard to procuring a blanket loan of \$12,500.00 from the bank, \$11,500.00 of it to constitute a mere renewal of the existing encumbrances thereon and \$1,000.00 to be paid over to the bankrupt [Rep. Tr. pp. 89,90].

These transactions had apparently not proceeded beyond the verbal negotiation stage. In fact, the negotiations appear to have been principally with the bankrupt's wife rather than the bankrupt [Tr. p. 90]. Probably because of the bitterness growing out of these domestic troubles, Mrs. Mau refused to go along and no escrow was ever opened.

In the meantime, Mau had a bill with Walbrooke Clothes, Inc., of Trenton, N. J. on which he owed the sum of \$730.92 [Tr. p. 22]. Walbrooke Clothes, Inc., was becoming impatient and wrote the bankrupt a letter demanding payment and calling the bankrupt's attention to the fact that the bill was overdue and had not been paid [Tr. p. 22]. Not hearing from the bankrupt, Walbrooke Clothes, Inc. got in touch with its local representative, Ellis Wishnow, and directed him to press the bankrupt for payment of the bill. Wishnow called on the bankrupt at his place of business after two letters had been sent direct from Trenton, N. J. to the bankrupt [Tr. p. 23]. When Wishnow presented his demand personally to the bankrupt for payment of this overdue bill, the bankrupt informed him that he had \$12,500.00 in escrow which was to be paid to him and that as soon as the money was released to him he would pay the bill. Wishnow then did the only logical thing under the circumstances, namely, suggested that if that were the case, the thing for him to do would be to write the Credit Manager, Mr. Goldberg, to that effect [Tr. p. 23]. The bankrupt turned the Credit Manager's letter over and in the presence of Mr. Wishnow wrote the false statement complained of, on the back of it, sealed the letter, and gave it to Wishnow to mail [Tr. pp. 91 and 115]. Wishnow commented on the fact that the letter was sealed and no money had been placed therein [Tr. p. 91].

The letter was received by Mr. Goldberg, the Credit Manager, who, believing the bankrupt's lies contained therein, was lulled into a false sense of security and refrained from pressing the claim for payment until it was too late and Mau was in bankruptcy.

Mr. Goldberg's reaction to these falsehoods is demonstrated in his deposition taken during the course of the trial.

At this point, we would backtrack a little bit so as to connect up the deposition which was taken on July 8, 1949, before Ruth D. Budson, Notary Public in Trenton, New Jersey. Specifications of Objection were filed to the bankrupt's discharge and signed by Mr. Early, a young lawyer in the office of the Attorneys for the Trustee, as counsel. The matter was called for trial on May 10, 1949, before Referee Hunt on the Specifications of Objection as drafted by Mr. Early. David Malamed was representing the bankrupt. Believing that Ellis Wishnow was the man who was responsible for the extension or renewal of credit, we relied on him as our witness. It developed at the time of the trial that the extension was actually granted by Mr. Goldberg back in Trenton and that Goldberg's testimony would be necessary to establish reliance thereon [Tr. pp. 48, 49]. It was agreed in open court that Goldberg's deposition could be taken on written interrogatories and the matter was continued [Tr. pp. 49, 50]. A written Stipulation was entered into between Mr. Malamed and the writer of this brief, the original of which apparently had been mislaid, or at least the Referee could not find it, and an executed copy in the hands of counsel was substituted in the record before the Referee therefor [Tr. p. 54]. The matter was adjourned from time to time between May 10th, when Wishnow was examined, and September

9, 1949, when the trial was resumed and completed. In the meantime, Mau had changed attorneys and Messrs. Quittner, Stutman and Shutan became his counsel. An attack was immediately made on the Specifications of Objection to the discharge of the bankrupt as drawn by Mr. Early and an amended objection drawn by the writer was filed [Tr. p. 6]. When the case was called for trial, the deposition of Goldberg which had been taken on written interrogatories previously submitted to Mr. Malamed, was on file and it was subjected to a blizzard of objections by several of counsel for this dishonest bankrupt. A motion to suppress the deposition had been filed and was invoked at the onset of the resumption of the trial [Tr. pp. 51, 52]. The Court's attention was called to the fact that the deposition had been taken pursuant to stipulation [Tr. p. 53], and the question was then raised that it had not been taken in accordance with the provisions of Rule 30-F, 31-B and 32-D [Tr. p. 54]. Counsel for the bankrupt apparently was not as familiar with the deposition as he should have been when he first raised the question that the deposition did not state that the witness was duly sworn [Tr. p. 55]. Counsel was wrong on that. Bankrupt's counsel then fell back on the technicality that there was no certificate that the deposition was a true record of the testimony given by the witness [Tr. pp. 55, 56, 57 and 58]. The Referee then announced that he would sustain that objection to the deposition, but that the objection being purely technical, he would permit the trustee to take it over again and correct the fact that the Notary Public had omitted to certify that it was a true record of the testimony given by the witness, and that he would not permit technicalities to control [Tr. p. 59].

After a recess, counsel for the bankrupt then came in and announced that for the purpose of saving time, but

nevertheless reserving their question of law, they would stipulate that the deposition now before the Court was a retaken deposition which had complied with all of the rules concerning certificates, but notwithstanding this stipulation, reserving their rights to raise the question of the discretion of the Referee in permitting the trustee to take the deposition over again to cure the highly technical question which they had raised [Tr. p. 60]. The deposition was then read in evidence and was greeted with a blizzard of hairsplitting objections to practically every question asked [Tr. pp. 62-73, 75-80, 97-114]. As a result of the objections and arguments made by counsel for the bankrupt, Mau had to be recalled to the stand two or three times and the record is in more or less a state of confusion. However, it is clearly evident from the testimony of the two witnesses, Ellis Wishnow and Isadore Goldberg, supplemented by the examination of the bankrupt as an adverse witness, that the following facts were definitely established: (1) That plaintiff's Exhibit No. 1, the letter in question, was written to the Walbrooke Clothes, Inc., by the bankrupt when Walbrooke Clothes, Inc., was pressing him for payment of his past due obligation [Tr. p. 65]; (2) That this letter contained information and representations regarding the bankrupt's financial condition, namely, that there *was* \$12,500.00 in escrow to be released to the bankrupt as soon as he could get the Court Order, and that his case had been postponed for three weeks more [Tr. p. 83]; (3) That there was no escrow to be released to him soon [Tr. p. 83]; (4) That he never paid the bill owing to Walbrooke Clothes, Inc., and that no part of it had been paid up to the date of the hearing on the opposition to discharge [Tr. pp. 84, 85]; (5) That Mau lied not only to the Credit Manager, Goldberg, in the letter, but to the local representative of

Walbrooke Clothes, Inc., when he called on him endeavoring to collect the account [Tr. p. 38]; (6) That Goldberg, upon receipt of the false and untrue letter, relied on the truth of the statements contained therein, and on the strength of them, withheld filing suit against Mau [Tr. pp. 75, 76].

A clearer case could not have been made under Section 14c of the National Bankruptcy Act.

The Law.

Section 14c of the National Bankruptcy Act insofar as it applies to the case at bar, reads as follows:

“The court shall grant a discharge, unless satisfied that the bankrupt has (3) obtained money or property on credit, or obtained *an extension or renewal of credit*, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing *respecting his financial condition*.” (Italics ours.)

Applying the test, not only of law but of reason, logic and sound common sense to this situation, we believe that this court can only reach the same conclusion that was reached by the Referee who saw the witnesses, and particularly the shifty, evasive bankrupt on the stand, and the District Court who reviewed the evidence and the law and was confronted with the same line of abstruse reasoning indulged in here by the bankrupt. The writer of this brief may be somewhat obtuse in his reasoning, or possibly somewhat deficient in his knowledge of the English language as it is spoken in this day and age. Possibly we are so obtuse that we cannot understand why a statement regarding a man's financial condition is not a statement regarding a man's financial condition and why a man

can represent in writing that he has \$12,500.00 in escrow which will be released to him very shortly and that the creditor will be paid if he will exercise a little patience, and still not characterize such a written statement as a false statement in writing respecting his financial condition. Possibly, counsel for the bankrupt are too subtle for the writer's unsophisticated mind, but there are a few questions we cannot refrain from asking. There is no dispute that this letter was in writing, written in the bankrupt's own handwriting, sealed in an envelope and delivered to the representative of Walbrooke Clothes, Inc., to forestall pressure on the payment of a past due obligation. Counsel now urge, as they did before the lower Court, that this was not a statement in writing respecting his financial condition such as is meant in Section 14c of the National Bankruptcy Act. If it was not, we would like to know what it was. Was it a statement of his physical condition? Was it a statement of his mental condition? Was it a statement of his marital difficulties, or what? Despite all of the sophistries indulged in by counsel for this dishonest bankrupt, the fact remains and will not down that the bankrupt represented in writing to Walbrooke Clothes, Inc., that *he had \$12,500.00 in escrow to be released to him as soon as he got the Court Order*; that his case had been postponed for three weeks more and that the trouble would all be settled in a few weeks [Tr. p. 23]. There was no money; there was no escrow; there was no \$12,500.00. If such a statement made to a creditor and intended to be acted upon does not constitute a statement in writing which was materially false and which pertained to the bankrupt's financial condition, then we must confess we do not understand the English language.

The bankrupt has cited a number of cases in his brief, none of which in our opinion, are germane or to the point. At page 9 of his brief, the bankrupt cites two cases: *Johnston v. Johnston*, 63 F. 2d 24, and *In re Morgan*, 267 Fed. 959. *Johnston v. Johnston*, 63 F. 2d 24 in nowise resembles the case at bar. In that case Johnston simply wrote a letter to the Farmers & Merchants Credit Corporation, a creditor, advising them that a relative of his, Vivian D. Johnston, was President and Manager of the Johnston Motor Company, a partnership composed of him and the bankrupt, and had authority to sign any papers in connection with the business. The facts contained in the letter were true, but the signature "James D. Johnston" appended thereto was a forgery, it having been signed by the bankrupt. It did not in any way pertain to the financial condition of the bankrupt. It merely stated that the bankrupt had authority to sign papers on behalf of the partnership and purported to be coming from Col. Johnston, his cousin, which was not true. In affirming an Order over-ruling the objections to the bankrupt's discharge, the Court specifically points out:

"The letter relied on was plainly not a statement respecting the financial condition of the bankrupt. It related neither to his financial condition nor to that of the partnership of which he was a member, but to his authority to act for the partnership. While its use was reprehensible, it cannot by any sort of interpretation be said to fall within the present language of the act. Even before the statute was amended, not every fraudulent representation would bar discharge. Even the giving of worthless checks or mortgages on property not owned was held not to come within its terms. *Robinson v. J. R. Williston & Co.*, 266 F. 970; *In re Rea Bros.*, 251 F. 431; *In re Hudson*, 262 F. 778."

In the *Matter of Morgan*, 267 Fed. 959, cited by counsel on the same page, the bankrupt was a stock broker. The bankrupt had sent out a prospectus pertaining to a stock issue of the Iowa Securities Corporation which was contemplating floating a stock issue through the bankrupt. The prospectus was inflated, but pertained to the soundness of the issuing company, not to the financial condition of the brokerage house. The objecting creditor made no investigation of the securities, but exchanged \$4,000.00 worth of bonds in another company for 40 shares of the Iowa Securities Corporation stock. In reversing the Order denying the discharge, the Circuit Court of Appeals for the Second Circuit, speaking through Judge Manton, said:

“A discharge in bankruptcy is refused when the bankrupt has made false written statements as to his financial standing and thereby obtains money or property from anyone relying on the statement. *Firestone v. Harvey* (C. C. A., 6th Cir.), 174 Fed. 574; *In re Bleyer* (C. C. A., 2d Cir.), 215 Fed. 896.”

Inasmuch as this prospectus did not relate to the financial condition of the bankrupt stock brokerage house, even though it was false, the discharge necessarily had to be granted. In the case at bar, there was a direct representation on the part of the bankrupt that he had among his assets \$12,500.00 in escrow to be released very shortly.

On page 10 of his brief, the bankrupt cites *In re Current*, 63 F. 2d 640. This case from the Seventh Circuit is likewise nowise in point. In the *Current* case, the bankrupt apparently conspired with the cashier of the Illiana State Bank at State Line, Indiana, to negotiate a forged paper. In the first instance, he borrowed \$2,000.00 on a note co-signed by his brother and his son. When the note

matured, a renewal note was prepared, to be signed by the bankrupt and his brother. Appellant forged his brother's name to the note. The cashier defaulted and the bank closed. The Court of Appeals reversed the Order denying the bankrupt his discharge, on the sole ground that the promissory note was not a false statement in writing respecting his financial condition. A blind person could see that!

We cannot see where *Levy v. Industrial Finance Corporation, et al.*, 276 U. S. 281 lends any aid or comfort to appellant. It merely points out that the amendment of May 27, 1926, changed the wording of Section 14 of the National Bankruptcy Act from:

“obtained money or property or credit upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person”

to read:

“A materially false statement * * * respecting his financial condition.”

It is true as Justice Holmes said, it served to limit the bars to his discharge more narrowly and by indirection to favor the defendant's position by a change of words, but in what way that statement can be said to help this bankrupt, is beyond our comprehension, because we have here a statement in writing respecting the bankrupt's financial condition to the extent of \$12,500.00.

Dave Rauch v. Manchester Smith Company, Inc., 240 Fed. 687, cited by the bankrupt at page 12 of his brief, is likewise not in point. There, the bankrupt wrote a letter to the objecting creditor telling him that he did not have a statement of his financial condition as he had not

taken inventory for some time, but that he could only say that he was perfectly solvent, but due to extreme dullness of business, he had had very little business at all and that he expected to realize some money on a bankrupt stock which he had purchased. There was no representation that he had \$12,500.00 in escrow. In fact, he even told the objecting creditor that business was poor. In reversing an Order denying his discharge, the Court of Appeals for the Fourth Circuit said:

“Surely this letter, taken as a whole, fails to sustain the charge of deliberate and purposeful deception. Not only is there no definite representation as to assets or debts, or anything else, but the general assertion of solvency is so qualified by succeeding statements as to deprive it of any seriously misleading import. In short, we think the letter furnishes no evidence of that dishonest purpose to obtain credit which the law declares shall operate to prevent a discharge. * * * Moreover, the record does not show that appellee proved, or even attempted to prove, that it parted with its property on the faith of Rauch’s letter and in reliance upon his statement that he was perfectly solvent, and certainly no presumption that such was the case arises from the facts now disclosed.”

This case was determined in 1917, ten years before the 1926 amendment, which included “extension or renewal of credit,” under the interdict imposed by Section 14 of the National Bankruptcy Act. In the case at bar, the witness, Goldberg, testified unequivocally that he believed the bankrupt’s false statement regarding the \$12,500.00 in escrow to be true [Tr. pp. 75, 97 and 98], and refrained from pressing the claim for immediate payment

[Tr. pp. 97, 107 and 108], and as a result of his forbearance found his company "holding the sack" in Mau's bankruptcy proceeding with a claim entirely unpaid [Tr. p. 83].

Much has been said in the bankrupt's brief with regard to the liberality which should be accorded a bankrupt in a right to his discharge. As an academic proposition, or as an abstract question of law, this may be true, but we know of no rule of law that requires the courts to be liberal with a *dishonest bankrupt*. In the *Matter of Merritt*, 28 F. 2d 679, the first case which this writer argued before this Court, the late Judge Gilbert closed his opinion affirming an Order denying a dishonest bankrupt's discharge in the following language:

"Objections to a discharge need not be proved beyond reasonable doubt. A fair preponderance as in civil trials is sufficient. *In re Garrity* (C. C. A.), 247 F. 310. Said Judge Coxe, in *Re Becker*, 106 F. 54: 'A discharge is intended to relieve misfortune, but it must be misfortune coupled with absolute honesty. It is the reward which the law grants to the bankrupt who brings his entire property into court and lays it, without reservation, at the feet of his creditors.'

In 1926, Section 14 was amended to shift the burden from the objecting creditors to the bankrupt when a *prima facie* case had been established and placing the burden on the bankrupt to show that he had not been guilty of any of the acts of omissions interdicted by Section c of the National Bankruptcy Act. See *Shanberg v. Saltzman*, 69 F. 2d 262; *Morton v. Snider*, 20 F. 2d 469; *Widder v. Seiff*, 94 F. 2d 6.

We might go still further and quote the language of the late Judge Cant of the District of Minnesota, in a bankruptcy case which was not reported in the Federal Reporter, but is found in the 14th Volume of the American Bankruptcy Reports (N .S.) at page 422:

“When people like this bankrupt make up their minds either that they cannot or that they will not pay their debts, all that they need to do, when they invoke the provisions of our very indulgent law, is to go straightforward and see that they shall not come within the teeth of its provisions. Then no harm will come. They will often work out an outrageous result, but they are within the terms of the law. If they try any other course, they need not be surprised and should not complain if they find that they have pulled the house down upon their own heads.

“This bankrupt has not offended more seriously than many others, but as fast as such matters come before the courts on records such as this, the disposition must be such as will serve to warn all that the right road is the best one to follow. The application for discharge should be denied.”

In the *Matter of Breitling*. 133 Fed. 146, the bankrupt had omitted a bill owing him for \$40.00 worth of lumber in drawing his schedules, had collected it shortly after bankruptcy and applied the money on costs and attorneys' fees. The District Court discharged him and on appeal, the Circuit Court of Appeals for the Seventh Circuit reversed the District Judge. Concluding its opinion, the Court said:

“The amount involved, it is true, is small, but the design to conceal was deliberate and is clear. We are indisposed to give countenance in the slightest de-

gree to any act which shall withhold from creditors any part of the estate of a bankrupt which lawfully he should devote to the payment of his debts. The decree is reversed.”

In the *Matter of Chris M. Jacobson, Bankrupt*, 9 F. 2d 139, the bankrupt, while drunk, had run over a small boy in Aberdeen, South Dakota, breaking his leg. Fearing suit, he recorded a transfer of 160 acres of land in Perkins County, South Dakota, to one A. W. Terriff. Judgment was entered against him in favor of the boy in the Circuit Court and Jacobson decided to go through bankruptcy. He procured a reconveyance of the land, recorded it, scheduled it in his schedules in voluntary bankruptcy, surrendered it to his trustee, and it was administered as assets in his estate. The Referee held that he had purged himself of any wrongdoing by procuring a reconveyance of the land before bankruptcy and scheduling it and therefore stood in *locus poenitentiae*. District Judge Elliott overruled the Referee's conclusions and denied the bankrupt's discharge by reason of the fact that he had kept this land in concealment during a part of the four months preceding the filing of the petition. We quote:

“In this particular case it appears without dispute that he transferred this property for the purpose prohibited in this statute, within the time named in the statute, and that an attachment had been levied upon the land as his property, and he was going to lose the property, and therefore, because it became apparent to him that his scheme to defraud was a failure, he brings the property so concealed into court, and asks the court to consider his privilege as

an honest debtor, and give him the benefits of the Bankruptcy Act in the discharge of his debts. In my judgment this is just such a situation as this provision of the law was intended to serve, and under the provision of this statute no debtor, who, within four months of the time of the filing of his petition, conceals his property with intent to hinder, delay, or defraud his creditors, can come into this court with the property he has concealed and say, in substance: 'Here is the property that I concealed with the intent and purpose prohibited by section 14c (4), and I now deem it to my best interests to file a petition in bankruptcy and to schedule the property, and therefore I am coming with clean hands and am entitled to my discharge.' The mere statement of the claim of such a right is not only repugnant to the plain provisions of the statute, but it is inconsistent with the well-settled principle of law that a discharge is by the terms of the statute expressly withheld from those whose conduct bring them within the provision of Section 14 of the Bankruptcy Act."

In the *Matter of Powell*, 22 F. 2d 239, the bankrupt was charged under Section 14b of the obtaining money or property on credit on a materially false statement in writing. The false statement in this case consisted of a chattel mortgage given by the bankrupts (husband and wife) on property which they did not own and knew they did not own at the time. In reply to the specious reasoning of the bankrupt's counsel that this did not constitute a materially false statement in writing as intended by the statute, the Court, after observing that he could not see why a false chattel mortgage, being in writing, did not fall within the definition, just as does a false statement of

assets generally, quoted from *In re Rea Brothers*, 251 Fed. 431, as follows:

“We agreed with the learned District Judge that a ‘materially false statement in writing’ cannot be confined to a financial statement made by the bankrupt, or a statement of his financial condition, and that it may include any ‘materially false statement in writing’ made by the bankrupt for the purpose of obtaining money or property on credit and by which said property or money is obtained; *but we think such false statement should not be created by inference alone from acts of the bankrupt.*” (Italics ours.)

The Findings of the Special Master were reversed and the discharge denied.

In *Albinak v. Kuhn*, 149 F. 2d 108, another case where the bankrupt had represented that certain accounts receivable discounted by him were genuine, the Court of Appeals for the Sixth Circuit in affirming an Order Denying the Bankrupt’s discharge, said:

“The argument is made that these assignments, notwithstanding their covenants, do not constitute a financial statement, implying, of course, that a financial statement is a term of art and purports to be a complete statement of assets and liabilities by which the precise financial worth of the person making the statement can be determined. However, the statute does not use the phrase ‘financial statement.’ It refers to a false statement respecting financial condition, made or published ‘in any manner whatsoever.’ The argument is, we think, tenuous, that a written statement listing as assets accounts which have no existence whatsoever, running into many thousands of dollars and including practically all of the receivables of the assignor, are not statements respecting the maker’s financial condition.”

Conclusion.

We could go on indefinitely citing cases involving denial of discharge of fraudulent bankrupts which indicate clearly that the so-called "liberality" surrounding questions of discharge, does not extend to dishonest bankrupts as distinguished from those whose bankruptcy is due to misfortune coupled with absolute honesty. Certainly, this bankrupt was anything but honest when he falsely represented in writing that he had \$12,500.00 in an escrow which would be released shortly and if his creditor showed patience it would be paid in full and he and the creditor whom he deceived would be able to "resume business in the fall so that both of them could prosper" [Tr. p. 41]. The bankrupt did not say that he "expected" to have \$12,500.00 put in escrow, or that he "expected" to raise \$12,500.00 on his home of which \$11,500.00 was to go to the bank, but stated as a positive fact that there was at that time \$12,500.00 in escrow which would be released probably within three weeks. The bankrupt knew that statement was false and untrue and admits it, and how his counsel can picture him as an honest bankrupt worthy of the privilege of a discharge is beyond our comprehension. Possibly, our ideas of what constitutes honesty are warped or naive, but we still insist that the letter written by the bankrupt meets every test under Section 14c of the National Bankruptcy Act, namely, it was in writing, it misrepresented an asset of \$12,500.00 which was non-existent. It was acted upon by the creditor to its detriment, and the bankrupt knew when

he made those representations that the representations were untrue. The bankrupt attempted throughout his testimony to convey the impression, although not directly so stating, that Ellis Wishnow, the creditor's representative, was responsible for his writing the letter in question. It is clearly evident upon a reading of the record that the bankrupt deceived Wishnow with the same line of talk that he incorporated into the written statement, and Wishnow merely suggested that he communicate that information to his superior, the Credit Manager. The act was the bankrupt's own and he should not now be absolved from the consequences of his own dishonesty.

We respectfully submit that the Order of the Referee and of the District Judge should be affirmed.

Dated this 9th day of August, 1950.

CRAIG, WELLER & LAUGHARN,
By THOMAS S. TOBIN,
Attorneys for Appellee.

THOMAS S. TOBIN,
Of Counsel.

No. 12547

United States
Court of Appeals
for the Ninth Circuit.

ADOLPH J. SCHNEE,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Appellee.

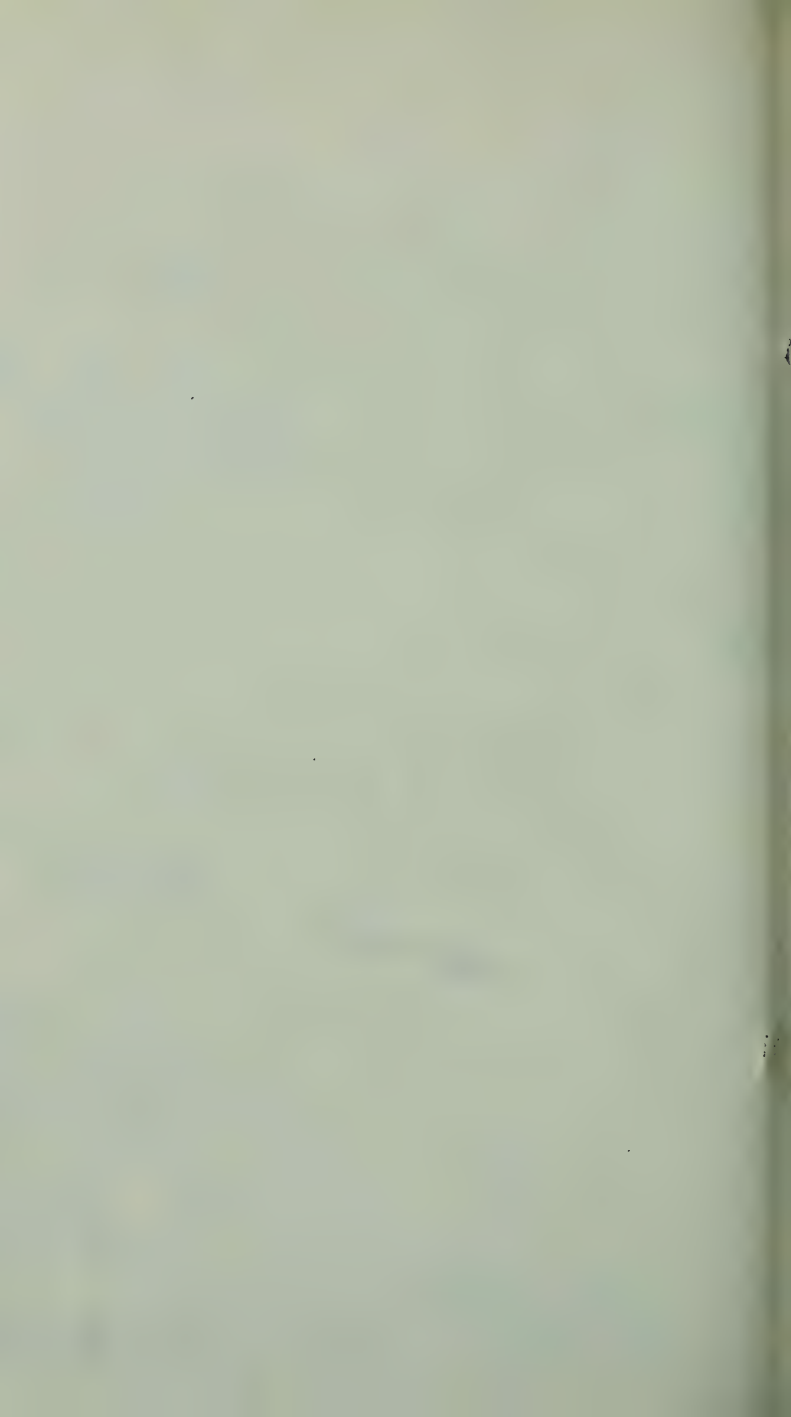
Transcript of Record

Appeal from the United States District Court,
District of Arizona.

FILED

JUL 24 1950

PAUL P. O'BRIEN,



No. 12547

United States
Court of Appeals
for the Ninth Circuit.

ADOLPH J. SCHNEE,

Appellant,

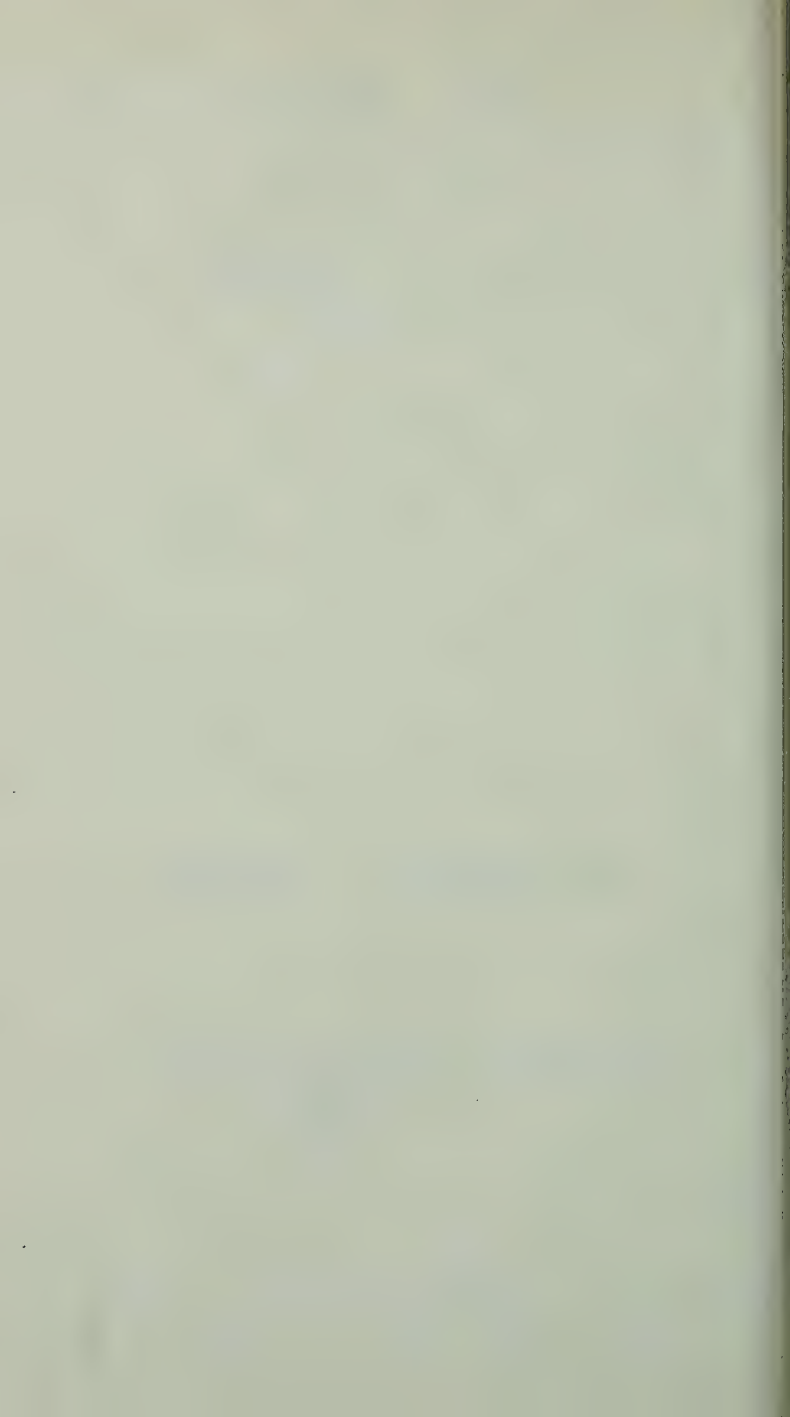
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In the District Court of the United States
for the District of Arizona

Civil Docket No. 486—Tucson

ADOLPH J. SCHNEE,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

FILINGS—PROCEEDINGS

1949

Jan. 3—File Record transferred from Northern
District of California.

Complaint.

Summons.

Stipulation Extending Time.

Answer.

Demand for Jury Trial.

Adavit of Service by Mail of Demand for
Jury Trial.

Notice of Time and Place of Trial.

Notice of Taking Deposition Pursuant to
Rules 26 and 30 of Federal Rules of Civil
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Motion for Transfer.

Certified Copy of Order Granting Motion
for Change of Venue.

Clerk's Certificate.

June 23—Plaintiff's praecipe for entry of dismissal
by Clerk, filed at Phoenix.

1949

June 24—Docket plaintiff's praecipe for dismissal.

Aug. 10—File defendant's motion to set.

Aug. 15—File Withdrawal of praecipe for dismissal.

Nov. 14—File Plaintiff's Motion to Set.

1950

Jan. 9—File deposition of Adolph J. Schnee.

Feb. 15—On for trial setting. No appearance for plaintiff. Henderson for defendant. Order set for trial Feb. 28, 1950, at 10 a.m. (Counsel agree this case may be called first on calendar for 2/28 in lieu of Civ 398 Tuc.)

Feb. 16—Issue notice to counsel of trial setting.

Feb. 27—File Praecipe for subpoenas.

Feb. 27—Issue subpoenas (8).

Feb 28—File deposition of Henrietta Roher.

Feb. 28—On for trial. Leslie C. Gillen and Edward W. Scruggs, present for plaintiff. B. G. Thompson and A. Henderson for defendant. Order admit Leslie C. Gillen to practice specially in this case and enter Edw. W. Scruggs as associate counsel for plaintiff. Enter proceedings of trial. Jury empaneled and sworn. At 3:20 recess to 9:30 a.m., tomorrow.

Feb. 28—Order allow counsel for plaintiff to withdraw temporarily the deposition of Henrietta Roher for purpose of having X-rays examined by local physician at his office.

Mar. 1—File depositions of Verne T. Inman and Paul A. Grigorieff.

1950

- Mar. 1—Docket Jury List, filed February 28, 1950.
- Mar. 1—File Plaintiff's Praecipe for subpoena duces tecum to Custodian St. Mary's Hospital.
- Mar. 1—Issue subpoena duces tecum to Custodian St. Mary's Hospital.
- Mar. 1—Enter further proceedings of trial. Counsel for plaintiff objects to trial of issue of liability first. Order objection overruled. Counsel for defendant moves for directed verdict on question of negligence. Order containing motion for further hearing to March 2, 1950, after close plaintiff's case. On stipulation counsel order allow counsel for plaintiff to withdraw depositions of Inman and Grigorieff overnight.
- Mar. 2—File deposition of Dr. J. Donald Francis, taken on plaintiff's behalf in San Francisco, California, on 3/1/50.
- Mar. 2—Enter further proceedings of trial. On stipulation of counsel, Order allow plaintiff to call custodian of records of St. Mary's Hospital at this time to identify records now produced pursuant to subpoena. At 4:10 p.m., Order recess to 9:30 a.m., tomorrow.
- Mar. 3—Enter further proceedings of trial. At 3:20 p.m., Order excuse jury from further consideration until 9:30 a.m., on 3/4/50. Thereupon counsel for defendant renews motion for directed verdict. Court fixes

1950

time for arguing defendant's motion and for arguing question of admissibility of statements and photographs on Saturday morning, at 9 a.m., to which time counsel are excused.

Mar. 4—Enter further proceedings of trial: At 9:00 a.m., parties and all counsel being present, argument is had on defendant's motion for directed verdict and for admissibility of exhibits. Motion for directed verdict, submitted, ruling reserved. Order exhibits admitted. Counsel stipulate to dismissal of first cause of action. Order dismiss as to first cause of action. At 10:30 o'clock, jury return to courtroom. Counsel for defendant reads statements and shows exhibits to jury. Counsel stipulate as to acceptance of any recognized standard mortality rates as to plaintiff's life expectancy. At 11:50 a.m., Order excuse jury to 3/6/50, at 10 a.m. Admissibility of deposition of Dr. Francis argued, ruling reserved. At 12:05, Order counsel excused to 3/6/50, at 9:30 a.m.

Mar. 4—File defendant's objection to deposition of Dr. J. Donald Francis, and Affidavit in Support thereof.

Mar. 6—File Plaintiff's Proposed Instructions.

Mar. 6—File Plaintiff's Additional Proposed Instructions.

Mar. 6—File Defendant's Proposed Instructions.

1950

- Mar. 6—On for further trial. At 10:00 a.m., all parties and all counsel and jurors are present pursuant to recess. Order appoint Chas. W. Otis as foreman and Order jury return verdict for defendant. Verdict signed; read by clerk and entered as verdict herein. Order judgment upon the verdict for the defendant against the plaintiff be entered herein. Order excuse jury from this case.
- Mar. 6—Enter and file verdict for defendant.
- Mar. 7—Enter and file judgment for the defendant on the verdict.
- Mar. 7—Mail notice to counsel of entry of judgment.
- Mar. 22—File subpoena Bonnie Tendler returned served 3/3/50.
- Apr. 5—File Plaintiff's Notice of Appeal.
- Apr. 5—Forward copy of Notice of Appeal to Messrs. Knapp, Boyle, Bilby & Thompson.
- Apr. 5—File Plaintiff's Cost Bond on Appeal.
- Apr. 5—File Plaintiff's Designation of Record on Appeal.
- May 1—File Volumes I & II of Reporter's Transcript of Testimony.
- May 10—Forward Record on Appeal to Clerk, Court of Appeals, Ninth Circuit, San Francisco, Calif.
- May 10—Forward copies letter of transmittal of record to Clerk, CCA, to counsel with copies of Clerk's Certificate.

In the District Court of the United States, Northern
District of California, Southern Division

No. 27834-R

ADOLPH J. SCHNEE,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

COMPLAINT FOR DAMAGES—PERSONAL
INJURIES FIRST CAUSE OF ACTION

Plaintiff complains of defendant and for First
Cause of Action alleges:

I.

That at all times herein mentioned defendant was,
and now is, a corporation organized and existing
under and by virtue of the laws of the State of
Kentucky, and does business in the State of Cali-
fornia, and in other states and has its principal
place of business in the City and County of San
Francisco, State of California, in the Northern
District of California; that said defendant was at
all times herein mentioned, and now is, engaged in
the business of a common carrier by railroad in
interstate commerce in said City and County and
State, as well as in other parts of the State of
California, and in other states.

II.

That at all times herein mentioned defendant was a common carrier by railroad engaged in interstate commerce and plaintiff was employed by defendant in such interstate commerce, and the injuries to plaintiff hereafter set forth arose in the course of and while plaintiff and defendant were engaged in the conduct of such interstate commerce.

III.

That this cause of action is brought under and by virtue of the provisions of the Safety Appliances and Equipment Act, 45 U.S.C.A., Section 1, et seq.

IV.

That on or about August 29, 1946, at or about 2:00 o'clock in the afternoon, plaintiff was employed as a signal maintainer riding on defendant's track approximately two (2) miles east of Wilcox, Arizona.

V.

That at said time and place, in the regular course and scope of his employment in such interstate commerce by defendant as aforesaid, plaintiff, having been sent by defendant to service a signal used in interstate commerce by defendant at a point approximately three (3) miles east of Wilcox, Arizona, was traveling on defendant's track and roadbed in a motor car of defendant; that in the course of said operation said motor car left said track and threw plaintiff up in the air and over to the side of said track, knocking plaintiff un-

conscious; that said motor car, and said track and roadbed were defective, insecure and insufficient and defendant used the same in interstate commerce in violation of the provisions of the Safety Appliances and Equipment Act, 45 U.S.C.A., Section 1 et seq; that as a proximate result of said motor car leaving said track and throwing plaintiff as aforesaid plaintiff suffered the following injuries:

1. A deep laceration of the skull with bony injury;
2. A fracture of the left index metacarpal bone;
3. A severe sprain of the distal joint of the right index finger;
4. A sprain of the low back;
5. A comminuted fracture of the left patella with marked chondromalacia of the remaining fragments of the patella;
6. A compound fracture of the right tibia and a fracture of the astragalus with upward displacement of the neck of the astragalus.

That as a direct result of the above injuries so sustained as aforesaid plaintiff suffered excruciating pain, severe physical and mental shock and was necessarily hospitalized for a long period of time, and still is suffering and is hospitalized as aforesaid.

That plaintiff is informed and believes and therefore alleges that said injuries are permanent, and may necessitate amputation of the right leg at the knee.

VI.

That at the time of the happening of the aforesaid accident, plaintiff was a strong and able-bodied man, capable of earning, and in fact earning, the sum of Two Hundred Ninety (\$290.00) Dollars per month; that as a direct and proximate result of defendant's use of said track and roadbed and motor car aforementioned, and its carelessness and negligence as aforesaid, and the injuries proximately caused thereby, plaintiff has been unable to follow his usual occupation, or, any occupation, and is informed and alleges that in the future he will be disabled for an indefinite period of time from following his usual occupation, or, any occupation, all to his damage in an amount as yet unascertainable, and when said sum is ascertained plaintiff will pray leave of court to insert said sum as a reasonable value of said loss of wages.

VII.

That in the necessary treatment of said injuries plaintiff has incurred expenses for the services of physicians and surgeons, and for hospitalization and for X-rays, and prays leave of this court to amend this complaint by incorporating herein the reasonable value of said services and articles when the same are ascertained.

VIII.

That by reason of the premises plaintiff has been damaged in the sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars.

Second Cause of Action

As and for a Second Cause of Action against defendant plaintiff complains of defendant and for cause of action alleges:

I.

Incorporates herein by reference Paragraphs I and II of plaintiff's First Cause of Action.

II.

That this cause of action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq.

III.

That on or about August 29, 1946, at or about 2:00 o'clock in the afternoon, plaintiff was employed as a signal maintainer riding on defendant's track approximately two (2) miles east of Wilcox, Arizona.

IV.

That at said time and place, in the regular course and scope of his employment in such interstate commerce by defendant as aforesaid, plaintiff, having been sent by defendant to service a signal used in interstate commerce by defendant at a point approximately three (3) miles east of Wilcox, Arizona, was traveling on defendant's track and roadbed in

a motor car of defendant; that in the course of said operation said motor car left said track and threw plaintiff up in the air and over to the side of said track, knocking plaintiff unconscious; that defendant carelessly and negligently failed to inspect said motor car and said track and roadbed and learn of their defective, insecure and insufficient condition, and carelessly and negligently failed to provide a safe motor car and safe track and roadbed for plaintiff; that as a proximate result of defendant's carelessness and negligence as aforesaid plaintiff suffered the following injuries:

1. A deep laceration of the skull with bony injury;

2. A fracture of the left index metacarpal bone;

3. A severe sprain of the distal joint of the right index finger;

4. A sprain of the low back;

5. A comminuted fracture of the left patella with marked chondromalacia of the remaining fragments of the patella;

6. A compound fracture of the right os calcis and a fracture of the astragalus with upward displacement of the neck of the astragalus.

That as a direct result of the above injuries so sustained as aforesaid plaintiff suffered excruciating pain, severe physical and mental shock and was

necessarily hospitalized for a long period of time, and still is suffering and is hospitalized as aforesaid.

That plaintiff is informed and believes and therefore alleges that said injuries are permanent, and may necessitate amputation of the right leg at the knee.

V.

Incorporates herein by this reference Paragraphs VI, VII and VIII of plaintiff's First Cause of Action against defendant.

Wherefore, plaintiff prays judgment against defendant in the sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars, together with such special damages as hereafter may be ascertained, and for his costs of suit herein.

LESLIE C. GILLEN,
Attorney for Plaintiff.

Duly verified.

Summons and return attached.

[Endorsed]: Filed Jan. 8, 1948.

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME

It is hereby stipulated by and between the respective parties hereto that the defendant Southern Pacific Company, a corporation, may have to and including the 13th day of February, 1948, within which to plead to plaintiff's complaint on file herein.

Dated this 29th day of January, 1948.

/s/ LESLIE C. GILLEN,
Attorney for Plaintiff.

So ordered Jan. 3, 1948.

/s/ LOUIS E. GOODMAN,
Judge.

Dated: January 30, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now defendant Southern Pacific Company, a corporation, and answers the complaint of plaintiff on file herein as follows:

Answering the First Cause of Action in said complaint contained, defendant admits, denies, alleges and avers as follows, to wit:

I.

Answering paragraph I, defendant admits that

at all times mentioned in the complaint it was a corporation organized and existing under and by virtue of the laws of the State of Kentucky and doing business in the State of California, and other States, and had its principal place of business in the City and County of San Francisco; that defendant was at all times mentioned in the complaint engaged in the business of a common carrier by railroad in interstate commerce in said City, County and State, as well as other States, and said defendant denies, generally and specifically that it now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky.

II.

Answering Paragraph II, defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

Further answering said Paragraph II, defendant admits that at the times and places set forth in plaintiff's complaint, plaintiff was employed by the aforementioned Southern Pacific Company, a Kentucky corporation, in interstate commerce.

III.

Answering Paragraphs V and VI, defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

IV.

Answering Paragraph VII, defendant alleges that it does not have sufficient information or belief on the subject to enable it to answer the, or any of the, allegations therein contained, and basing its denial on that ground, denies each and every, all and singular, generally and specifically, the allegations contained in said Paragraph VII, and each and every part thereof.

V.

Answering Paragraph VIII, defendant denies that by reason of any carelessness or negligence on its part plaintiff has been damaged in the sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars, or in any other sum or sums whatsoever, or at all.

Wherefore, defendant prays judgment as hereinafter set forth.

Answering the further second, separate and distinct cause of action in said complaint set forth, defendant admits, denies, alleges and avers as follows, to wit:

I.

Answering Paragraph I, defendant refers to its answer to Paragraphs I and II of the First Cause of Action, and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

II.

Answering Paragraph IV, defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

III.

Answering Paragraph V, defendant refers to its answer to Paragraphs VI, VII and VIII of the First Cause of Action, and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

Further answering said complaint, and as a separate defense to said action, defendant avers that plaintiff was himself careless and negligent in and about the matters and things in said complaint set forth, and that said carelessness and negligence of plaintiff proximately contributed to the happening of the accident in the complaint referred to, and the injuries, if any, complained of by plaintiff.

Further Answering Said Complaint, and as a Separate Defense To Said Action, defendant avers that plaintiff was himself guilty of carelessness and negligence in and about the matters and things in said complaint referred to and that said carelessness and negligence of plaintiff was the sole proximate cause of his injuries, if any.

Wherefore, defendant prays that plaintiff take

nothing by his action, and that it have judgment for its costs of suit.

JOHNSON, RICKSEN &
JOHNSON,

/s/ MARSHALL RICKSEN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 17, 1948.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

To defendant above-named and to Messrs. Johnson & Rickson & Johnson, its attorneys:

You and each of you will please take notice that plaintiff hereby demands a trial by jury in the above-entitled action.

Dated: This 14th day of February, 1948.

/s/ LESLIE C. GILLEN,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 17, 1948.

[Title of District Court and Cause.]

CLERK'S NOTICE OF TIME AND PLACE OF TRIAL

To Leslie C. Gillen, Esq., 886 Mills Bldg., San Fran-

cisco 4, Calif., and Messrs. Johnson, Ricksen & Johnson, 1003 Central Bank Bldg., Oakland 12, Calif.

You are hereby notified that on March 29, 1948, the above-entitled case will appear on the Law and Motion calendar of Judge Michael J. Roche, to be set for trial.

Dated Feb. 16, 1948.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

CLERK'S NOTICE OF PRE-TRIAL
CONFERENCE

To Leslie C. Gillen, Esq., 886 Mills Bldg., San Francisco 4, Calif., and Messrs. Johnson, Ricksen & Johnson, 1003 Central Bank Bldg., Oakland 12, Calif.

You are hereby notified that on March 29, 1948, Judge Michael J. Roche ordered that the above-entitled case be and the same hereby is continued to April 12 for a pre-trial conference.

Dated March 30, 1948.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

NOTICE OF TIME AND PLACE OF TRIAL
To Defendant above-named and to Messrs. Johnson, Ricksen & Johnson, its attorneys:

You and each of you will please take notice and you are hereby notified that the above-entitled action is set for trial before Honorable Michael J. Roche, District Judge, at his Courtroom, United States Post Office and Court House Building, Seventh and Mission Streets, San Francisco, California, on the 5th day of October, 1948 at 10:00 o'clock in the forenoon of said day.

Dated: This 7th day of May, 1948.

/s/ LESLIE C. GILLEN,
Attorney for Plaintiff.

Receipt of copy admitted.

[Endorsed]: Filed June 11, 1948.

[Title of District Court and Cause.]

NOTICE OF TAKING DEPOSITION PURSU-
ANT TO RULES 26 AND 30 OF FEDERAL
RULES OF CIVIL PROCEDURE

To Plaintiff, Adolph J. Schnee, and to Leslie C. Gillen, his attorney:

You, and each of you, will please take notice that defendant Southern Pacific Company, having answered herein, will take in the above-entitled action, for discovery and to be used therein as evidence, and as authorized by the Federal Rules of Civil Procedure, the deposition of plaintiff Adolph J. Schnee.

Said deposition will be taken at 2:30 o'clock p.m., on Monday, October 18, 1948, and will continue thereafter until completed, and if not completed on said day will be continued from day to day (Sundays and holidays excepted) until completed.

Said deposition will be taken before Harold Hart whose address is 564 Market Street, San Francisco, California, and who is a Notary Public in and for the City and County of San Francisco, and an officer authorized to administer oaths by the laws of the State of California, the place where the examination is to be held, and who is not a relative or an employee or an attorney of any of the parties to the above-entitled action, or their attorneys, or financially interested in the above-entitled action.

Said deposition will be taken at the offices of Hart and Hart, 564 Market Street, Room 715, Chancery Building, San Francisco, California, at which time and place you are hereby notified to appear.

Said deposition will be taken on oral interrogatories.

Dated this 8th day of October, 1948.

JOHNSON, RICKSEN,
FREEMAN & JOHNSON,

By /s/ JAMES H. FREEMAN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 9, 1948.

[Title of District Court and Cause.]

MOTION FOR TRANSFER

To the plaintiff above named, Adolph J. Schnee,
and to Leslie C. Gillen, his attorney:

You, and each of you, will please take notice that defendant Southern Pacific Company, a corporation, on Monday, November 22, 1948, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, will move the above-entitled Court for an Order transferring the above-entitled action to the Federal District Court of Arizona, under the provisions of U.S.C.A., Title 28, Section 1404 A, B and C for the convenience of parties and witnesses, and in the interest of justice. Said motion will be based upon the following grounds:

1. Plaintiff in this action resides in said District, to wit, at 2470 Oracle Road, Tucson, Arizona.

2. The accident giving rise to this action took place in said District, to wit, at the Southern Pacific tracks in the vicinity of Willcox, Arizona.

3. Defendant will require the appearance of approximately ten (10) witnesses, all of whom reside in the State of Arizona.

4. Plaintiff received his preliminary medical attention within the boundaries of said District, to wit, Tucson, Arizona, and the doctors performing said treatment reside in Tucson, Arizona.

5. Said District of Arizona is a District where said action might have been brought.

Attached hereto is an Affidavit in support of said Motion.

Dated this 17th day of November, 1948.

JOHNSON, RICKSEN,
FREEMAN & JOHNSON,

By /s/ JAMES H. FREEMAN,
Attorneys for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES H. FREEMAN

State of California,
County of Alameda—ss.

James H. Freeman, being first duly sworn, deposes and says: That he is now and at all times herein mentioned, was over the age of 21 years and is not a party to the above-entitled action; that he is one of the attorneys in charge of the defense of this action; that he is familiar with the pleadings and evidentiary matter to be used in the said defense and that from a study of such evidentiary matter now at his disposal, states that plaintiff in this action resides in Arizona, to wit, at 2470 Oracle Road, Tucson, Arizona; that the accident giving rise to this action took place at the Southern Pacific tracks in the vicinity of Willcox, Arizona; that it

appears from the evidentiary matter that defendant will require the appearance of approximately ten (10) witnesses, all of whom reside in Arizona; that plaintiff received his preliminary medical attention in Tucson, Arizona, and the doctors performing such preliminary treatment reside in Arizona; that the issue of liability in this matter is disputed and to adequately defend this action, it appears that the attendance of approximately ten (10) witnesses plus one (1) or more medical witnesses must be brought from Arizona to attend this trial in San Francisco in the event the matter is not transferred to Arizona; that this transportation of witnesses would place defendant and said witnesses at a considerable expense and inconvenience.

/s/ JAMES H. FREEMAN.

Subscribed and sworn to before me this 17th day of November, 1948.

[Seal] DELIA L. EDGE,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed Nov. 17, 1948.

In the District Court of the United States, Northern
District of California, Southern Division.

No. 27834-R

ADOLPH J. SCHNEE,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

ORDER FOR TRANSFER

Due notice of motion having been given, and the parties having appeared before said Court, and evidence, authorities and argument presented to said Court, and it appearing to said Court that said Motion being one properly brought under the Provisions of U.S.C.A., Title 28, Section 1404 A, B and C, and that:

1. The plaintiff in this action resides in Arizona, to wit, at 2470 Oracle Road, Tucson, Arizona;

2. The accident giving rise to this action took place in Arizona, to wit, at the Southern Pacific tracks in the vicinity of Willcox, Arizona.

3. It appears that defendant will require the appearance of approximately ten (10) witnesses, all of whom reside in the State of Arizona.

4. The doctors who treated plaintiff during some stages of his injury reside in Arizona.

It further appearing that the Federal District Court of Arizona is a district where said action might have been brought, that said Transfer is for the convenience of parties and witnesses, in the interest of justice, and good cause appearing therefor,

It is therefore ordered that this case be transferred to the United States District Court for the District of Arizona, and that the Clerk of this Court shall forthwith forward all of the files in said proceeding to the Clerk of said District at Arizona, together with a copy of this Order.

Dated this 3rd day of December, 1948.

MICHAEL J. ROCHE,
Judge, U. S. District Court.

A true copy.

[Endorsed]: Filed Dec. 3, 1948.

United States District Court
Office of the Clerk

Northern District of California
San Francisco 1

(Record Transferred from Northern District of
California) No. 27834-R—Cir. 486—Tue.

[Title of Cause.]

CLERK'S CERTIFICATE OF TRANSFER

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, to wit:

1. Complaint.
2. Summons.
3. Stipulation Extending Time.
4. Answer.
5. Demand for Jury Trial.
6. Affidavit of Service by Mail of Demand for Jury Trial.
7. Notice of Time and Place of Trial.
8. Notice of Taking Deposition Pursuant to Rules 26 and 30 of Federal Rules of Civil Procedure.
9. Motion for Transfer.

are the original documents filed in the above case, together with a certified copy of the Order granting the motion for change of venue.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said District Court, at

San Francisco, California, this 7th day of December, 1948.

[Seal] /s/ C. W. CALBREATH,
Clerk.

[The foregoing record transferred from the Northern District of California: Endorsed and Filed Jan. 3, 1949, U.S.D.C., for the District of Arizona.]

In the District Court of the United States
for the District of Arizona

Honorable Claude McColloch, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

MINUTE ENTRY OF FEBRUARY 28, 1950

This case comes on regularly for trial this day. The plaintiff is present with his counsel, Leslie C. Gillen, Esq., and Edward W. Scruggs, Esq., B. G. Thompson, Esq., and Arthur Henderson, Esq., are present for the defendant. Fred Baker is present as the official court reporter.

It Is Ordered that Leslie C. Gillen be admitted to practice in this Court specially in this case and that Edward W. Scruggs be entered as associate counsel for the plaintiff.

Both sides announce ready for trial.

Examination of jurors on voir dire is now had. Thereupon, at the hour of twelve o'clock, noon,

It Is Ordered that the further trial of this case be continued to the hour of two o'clock p.m., this date, to which time the Jurors, being first duly admonished by the Court, all parties and counsel are excused.

Subsequently, at the hour of two o'clock p.m., the Jurors, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Examination of jurors on voir dire is resumed and concluded.

At the hour of 2:50 o'clock p.m., all jurors are excluded from the courtroom.

Counsel for the plaintiff now states that the plaintiff is in a position where three veniremen who have an attorney-client relationship with the defendant's counsel are on the panel and that the plaintiff's three preemptory challenges would be exercised and exhausted thereon, and moves for a re-examination of said jurors.

Counsel for the defendant stipulates that one of said veniremen Fernando B. Pacheco, may be excused for cause, and It Is So Ordered.

Thereupon, at the hour of 3:00 o'clock p.m., the jurors return into Court, and further examination of jurors on voir dire is now had.

A lawful jury of twelve persons now duly empaneled and sworn to try this case, and

It Is Ordered that all jurors not empaneled in the trial of this case be excused until March 6, 1950, at ten o'clock a.m.

And thereupon, at the hour of 3:20 o'clock p.m., It Is Ordered that the further trial of this case be continued to the hour of 9:30 o'clock a.m., March 1, 1950, to which time the jury, being first duly admonished by the Court, all parties and counsel are excused.

In the District Court of the United States
for the District of Arizona

Honorable Claude McColloch, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

MINUTE ENTRY OF MARCH 1, 1950

The jury, and all members thereof, all parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Statement of the case is now made by the counsel for the respective parties to the jury.

Counsel for the plaintiff moves to invoke the Rule. Said motion is granted and all witnesses present are now duly sworn, instructed by the Court and excluded from the courtroom.

Counsel for both sides now stipulate with respect to plaintiff's employment with the defendant corporation at the time of the accident.

Plaintiff's Case:

The plaintiff, Adolph J. Schnee, is now sworn and examined in his own behalf.

Thereupon, at the hour of twelve o'clock, noon, It Is Ordered that the further trial of this case be continued to the hour of 1:30 o'clock p.m.

Subsequently, at the hour of 1:30 o'clock p.m., the jury, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

The Court now indicates that the issue of liability will be tried first.

Plaintiff's Case Continued:

The plaintiff, Adolph J. Schnee, is now recalled and further examined in his own behalf.

Counsel for the defendant elects to cross-examine the plaintiff as an adverse party as a part of the defendant's case.

Dick Hallmark is now sworn and examined on behalf of the plaintiff.

Thereupon, at the hour of 2:40 o'clock p.m., It Is Ordered that the further trial of this case be continued to the hour of 3:00 o'clock p.m.

Subsequently, at the hour of 3:00 o'clock, p.m., the jury, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Counsel for the plaintiff now states that he has an objection to make at this time, and

It Is Ordered that the record show that said objection may be made at adjournment.

Dick Hallmark is now recalled and further examined on behalf of the plaintiff.

Richard R. Singleton is now sworn and examined on behalf of the plaintiff.

Counsel for the plaintiff now states that the plaintiff has an additional witness on the question of liability who is not available at this time.

It Is Orderēd that the defendant's case on the question of liability proceed at this time and that the defendant's motion to be made at the close of the plaintiff's case may be presented at recess time as of the close of plaintiff's case. Counsel for the plaintiff objects to the defendant's case opening before the plaintiff's case is closed.

Defendant's Case:

The following defendant's witnesses, heretofore sworn, are now called and examined: Alexander J. Young, Mark O. Wallace.

Thereupon, at the hour of 4:00 o'clock p.m., the jury is excused to March 2, 1950, at the hour of ten o'clock, a.m.

Counsel for the plaintiff now objects to the Court proceeding in the manner indicated by the Court and states his grounds therefor, and

It Is Orderēd that said objection be and it is overruled and that the plaintiff be allowed to call his other witness at ten o'clock a.m., tomorrow.

Counsel for the defendant now moves for a directed verdict on the question of defendant's negligence, for want of proof, and argues said motion to the Court.

It is ordered that said motion be continued for

further hearing until after the close of plaintiff's case.

Thereupon, at the hour of 4:10 o'clock p.m., It Is Ordered that the further trial of this case be continued to the hour of ten o'clock a.m., March 2, 1950, to which time all parties and counsel are excused.

On stipulation of counsel, It Is Ordered that the plaintiff be allowed to withdraw the depositions of Verne T. Inman and Paul A. Gregorieff overnight.

In the District Court of the United States
for the District of Arizona

Honorable Claude McColloch, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

MINUTE ENTRY OF MARCH 2, 1950

The jury, and all members thereof, all parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Counsel for the plaintiff now states that the plaintiff has no other witnesses to call at this time.

Defendant's Case Continued:

Robert W. Ward, heretofore sworn, is now called and examined on behalf of the defendant.

On stipulation of counsel,

It Is Ordered that the plaintiff be allowed to call the Custodian of Records of St. Mary's Hospital at this time to identify records now produced pursuant to subpoena.

Patricia May James is now sworn and examined on behalf of the plaintiff.

Plaintiff's exhibit 4, St. Mary's Hospital records pertaining to A. J. Schnee, is now admitted in evidence.

It Is Ordered that said exhibit 4 be returned to St. Mary's Hospital after this trial.

Robert W. Ward, heretofore sworn, is now recalled and further examined on behalf of the defendant.

N. A. Wisner, heretofore sworn, is now called and examined on behalf of the defendant.

Robert W. Ward, heretofore sworn, is now recalled and further examined on behalf of the defendant.

Plaintiff's exhibit 5, Statement of Robert W. Ward, is now admitted in evidence.

Plaintiff's exhibit 6, Diagram, is now admitted in evidence.

David E. Wisner, heretofore sworn, is now called and examined on behalf of the defendant.

Thereupon, at the hour of 12:00 o'clock, noon, It Is Ordered that the further trial of this case be continued to the hour of 1:30 o'clock p.m.

Subsequently, at the hour of 1:30 o'clock, p.m., the jury, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case Continued:

Robert W. Ward, heretofore sworn, is now recalled and further examined on behalf of the defendant.

Defendant's exhibit A, Statement of Robert W. Ward, is now admitted in evidence.

James M. Carroll, heretofore sworn, is now called and examined on behalf of the defendant.

R. S. Glasser is now sworn and examined on behalf of the defendant.

Adolph J. Schnee, heretofore sworn, is now called and cross-examined by the defendant under the statute.

John D. Caldwell is now sworn and examined on behalf of the defendant.

Thereupon, at the hour of 4:10 p.m., It Is Ordered that the further trial of this case be continued to the hour of 9:30 o'clock a.m., March 3, 1950, to which time the jury, all parties and counsel are excused.

In the District Court of the United States
for the District of Arizona

Honorable Claude McColloch, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

MINUTE ENTRY OF MARCH 3, 1950

The jury, and all members thereof, all parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Defendant's Case Continued:

The following defendant's witnesses heretofore sworn are now recalled and further examined: John D. Caldwell, Mark O. Wallace.

Defendant's exhibit F, Employee's Report of Accident, except as to the portion that testimony shows was added after employee's statement was made, is now admitted in evidence, and

It Is Ordered that the Clerk obliterate the portion which testimony shows was added.

Mary Jo Russell Stephens is now sworn and examined on behalf of the defendant.

Thereupon, at the hour of 10:35 o'clock, a.m., It Is Ordered that the further trial of this case be continued to the hour of 10:45 o'clock a.m.

Subsequently, at the hour of 10:45 o'clock a.m., the jury, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case Continued:

Mary Jo Russell Stephens heretofore sworn is now further examined on behalf of the defendant.

Mary Stewart is now sworn and examined on behalf of the defendant.

It Is Ordered that defendant's exhibit H, as to the upper portion of the First Injury Report, be admitted provisionally.

Leland E. Lyon, heretofore sworn, is now called and examined on behalf of the defendant.

It Is Ordered that defendant's exhibits C-4 and C-5, Photographs, be admitted in evidence.

Thereupon, at the hour of 12:00 o'clock, noon, It Is Ordered that the further trial of this case be continued to the hour of 1:30 o'clock p.m.

Subsequently, at the hour of 1:30 o'clock p.m., the jury, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case Continued:

Alfred Clarence Jacobson, heretofore sworn, is now called and examined on behalf of the defendant.

The following defendant's exhibits are now admitted in evidence: C-1, Photograph, C-2, Photograph, C-3, Photograph, J, Photograph, K, Photograph, L, Photograph, B, Photographs (7), D-1, Photograph, D-2, Photograph, D-3, Photograph, D-4, Photograph, D-5, Photograph, and G, Statement of Adolph J. Schnee.

And the defendant rests.

Rebuttal:

Alma Tendler, known as Bonnie, is now sworn and examined on behalf of the plaintiff.

Mrs. Adolph Schnee, heretofore sworn, is now called and examined on behalf of the plaintiff.

Adolph Schnee, heretofore sworn, is now recalled and further examined in his own behalf.

Defendant's exhibit M, only that portion of the Application of Employment containing the applicant's signature, is now admitted in evidence.

Counsel for the plaintiff now requests leave to call one more witness tomorrow.

Surrebuttal:

The defendant rests on the question of liability except for reading to the jury the exhibits admitted dependent on the Court's ruling on the admissibility of statements.

Thereupon, at the hour of 3:20 o'clock p.m., It Is Ordered that the jury be excused until Saturday, March 4, 1950, at 9:30 o'clock a.m.

Counsel for the defendant now renews his motion for a directed verdict in two parts on the grounds that no evidence has been presented to show liability and secondly, that no evidence proving negligence has been presented.

Whereupon, the Court fixes the time for arguing defendant's motion for a directed verdict and for arguing the question of admissibility of statements on Saturday, March 4, 1950, at nine o'clock a.m., to which time all parties and counsel are excused.

In the District Court of the United States,
for the District of Arizona

Honorable Claude McColloch, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

MINUTE ENTRY OF MARCH 4, 1950

At the hour of nine o'clock a.m., Leslie C. Gillen, Esquire, and Edward W. Scruggs, Esq., are present for the plaintiff. B. G. Thompson, Esquire, and Arthur Henderson, Esquire, are present on behalf

of the defendant. The admissibility of exhibits is now argued by respective counsel, and

It Is Ordered that the exhibits be admitted.

Defendant's motion for a directed verdict is now duly argued by respective counsel.

Counsel for the plaintiff states that the plaintiff is willing to stipulate to dismissal of the first cause of action. Whereupon,

It Is Ordered that this case be and it is dismissed as to the first cause of action.

Defendant's motion for directed verdict is further argued by counsel, submitted and taken under advisement.

The exhibits heretofore admitted provisionally, to wit: photograph and statements, are now admitted in evidence.

Thereupon, at the hour of 9:30 o'clock a.m., the jury, and all members thereof, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Counsel for the defendant now reads defendant's exhibit F, exhibit G and exhibit H to the jury and the photographs admitted in evidence are presented to the jury.

Adolph J. Schnee, heretofore sworn, is now recalled and further examined in his own behalf.

Respective counsel now stipulate to acceptance of any recognized standard mortality rate as to plaintiff's life expectancy.

Thereupon, at the hour of 11:45 o'clock a.m., It Is Ordered that the jury be excused until Monday, March 6, 1950, at ten o'clock a.m.

Admissibility of the deposition of Dr. Francis is now argued. The Court reserves ruling.

At the hour of 12:05 o'clock noon, It Is Ordered that the further trial of this case be continued to the hour of 9:30 o'clock a.m., on Monday, March 6, 1950, to which time all parties and counsel are excused.

In the District Court of the United States,
for the District of Arizona

Honorable Claude McColloch, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

MINUTE ENTRY OF MARCH 6, 1950

The jury, and all members thereof, all parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

It Is Ordered that Charles W. Otis be and he is appointed as Foreman of the jury, and It Is Ordered that the jury return a verdict in favor of the defendant. Whereupon, the Foreman signs and presents the following verdict:

[Title of District Court and Cause.]

VERDICT

We, the jury, duly empaneled and sworn to try the above-entitled cause, do, by direction of the Court, find for the Defendant.

Dated this 6th day of March, 1950.

CHAS. W. OTIS,
Foreman.

The verdict is read as recorded, and

It Is Ordered that Judgment upon the verdict for the defendant and against the plaintiff be entered herein.

It Is Further Ordered that the jury be discharged from the further consideration of this case.

In the District Court of the United States
for the District of Arizona

No. Civil 486-Tucson

ADOLPH J. SCHNEE,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

VERDICT

We, the jury, duly empaneled and sworn to try
the above-entitled cause, do, by direction of the
Court, find for the Defendant.

Dated this 6th day of March, 1950.

/s/ CHAS. W. OTIS,
Foreman.

[Endorsed]: Filed Mar. 6, 1950.

In the United States District Court
for the District of Arizona

No. Civ. 486-Tucson

ADOLPH J. SCHNEE,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

JUDGMENT

This Cause coming on regularly for trial before the Court sitting with a jury, and the evidence on the part of the plaintiff and defendant on the issue of defendant's liability herein having been presented, and the Court having thereupon, on motion of the defendant, directed a verdict for defendant, and the jury having returned its verdict accordingly:

Wherefore, It Is Ordered and Adjudged, that plaintiff take nothing by his action and no costs.

Done in open Court this 7th day of March, 1950.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed and docketed Mar. 7, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS RULE 73(b)

Notice Is Hereby Given that Adolph J. Schnee, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 7, 1950.

Dated, San Francisco, April 3rd, 1950.

/s/ LESLIE C. GILLEN,
San Francisco, Attorney for
Appellant,
Adolph J. Schnee.

SCRUGGS & BUTTERFIELD,

By /s/ EDWARD W. SCRUGGS,
Tucson, Attorneys for
Appellant,
Adolph J. Schnee.

Copy received 4/15/50.

[Endorsed]: Filed April 5, 1950.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Adolph J. Schnee, as Principal and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut, and authorized to transact surety business in the State of Arizona, as Surety, do hereby acknowledge ourselves, jointly and severally bound to Southern Pacific Company, a corporation, defendant, in the above-entitled case, for the Sum of Two Hundred Fifty and No/100 Dollars (\$250.00) for the payment of all costs of appeal if the appeal taken in the above-entitled case is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified.

Sealed with our seals, and dated this 5th day of April, A.D. 1950.

Conditioned, however, that the said plaintiff in the above-entitled case will pay all costs on appeal from the judgment entered in said case on the 7th day of March, 1950, if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, and judgment for said costs may be entered against us, and each of us, in the final judgment of this cause.

In Testimony Whereof, the said Principal has subscribed his name and affixed his seal, and the

said Surety has caused its name and seal to be hereunto affixed by its duly authorized agent at Tucson, Arizona, on the day and year first hereinabove written.

/s/ ADOLPH J. SCHNEE,

By /s/ EDWARD W. SCRUGGS,
As His Attorney,

HARTFORD ACCIDENT AND
INDEMNITY COMPANY,
Surety,

By /s/ [Indistinguishable.]

[Endorsed]: Filed April 5, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL
RULE 75

Plaintiff and appellant Adolph J. Schnee hereby designates for inclusion the complete record and all the proceedings and evidence in the action.

Dated, San Francisco, April 3rd, 1950.

/s/ LESLIE C. GILLEN,
Attorney for Said Plaintiff
and Appellant.

SCRUGGS & BUTTERFIELD,
By /s/ EDWARD W. SCRUGGS,
Attorneys for Appellant,
Adolph J. Schnee.

Copies received.

[Endorsed]: Filed April 5, 1950.

In the District Court of the United States
for the District of Arizona

No. Civ. 486-Tucson

ADOLPH J. SCHNEE,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

TRANSCRIPT OF TESTIMONY AND
PROCEEDINGS

Taken before the Honorable Claude McColloch,
Judge, and Jury, on Tuesday, February 28, 1950,
at 10:00 o'clock a.m., at Tucson, Arizona.

Appearances:

LESLIE C. GILLEN and

EDWARD W. SCRUGGS,

For the Plaintiff.

KNAPP, BOYLE, BILBY & THOMPSON,

By B. G. THOMPSON and

ARTHUR HENDERSON,

For the Defendant.

The Court: Are we ready to proceed with Civil Number 486?

Mr. Scruggs: We are ready, your Honor.

Mr. Thompson: Ready.

The Court: Call the Jury.

The Clerk: There are forty-seven names in the box; we draw the names of eighteen.

The Court: All right.

(Jury panel called and sworn.)

(Jury panel examined by Court and counsel and Jury impaneled and sworn.)

The Court: The other jurors are now excused until next Monday morning at 10:00 o'clock in this Courtroom.

Gentlemen of the Jury, that is all we can do to-day. Don't discuss this case or permit it to be discussed with you until it is submitted to you; in the meantime you are excused until 9:30 in the morning.

(Whereupon a recess was taken at 3:00 o'clock p.m. until 9:30 o'clock a.m., Wednesday, March 1st.)

The Court: Mr. Gillen, you may make your opening statement.

Thereupon, after counsel for the respective parties made their opening statements to the Jury the following proceedings were had:

The Court: Call the witnesses.

Mr. Gillen: Your Honor, the plaintiff will ask at this time that all witnesses be excluded from the

Courtroom. That, of course, does not include the plaintiff.

The Court: Is that the usual practice on the request of either side? [2*]

Mr. Thompson: It is, your Honor.

The Court: Very well.

Mr. Thompson: The usual practice is to call the witnesses and have them sworn so that the Court can admonish them not to violate the order.

The Court: Whatever way you usually do it.

Mr. Thompson: The practice is for the plaintiff to call his witnesses first.

(Witnesses called and sworn.)

The Court: Mrs. Schnee, and gentlemen, you understand you are not to come in the Courtroom, except when the Bailiff comes out and calls you in to testify. Be sure to observe that.

Mr. Gillen: I anticipate other witnesses; at any other session we may take the precaution of checking, your Honor. May I ask at this time whether or not counsel for the defendant will be willing to stipulate as a proven fact that on August 29, 1946, at the time this accident occurred that Mr. Schnee, the plaintiff in the action, was an employee of the Southern Pacific Company engaged in interstate commerce and acting within the scope of his employment as a signal maintenance man.

Mr. Henderson: Yes, we will so stipulate.

Mr. Gillen: That will be a conceded fact, Your Honor. [3]

* Page numbering appearing at top of page of original Reporter's Transcript.

The plaintiff will take the witness stand in his own behalf.

ADOLPH J. SCHNEE

the plaintiff herein, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gillen:

Q. Mr. Schnee, I want you to speak clear so that everyone in here can hear you, the Court, Jury, and Reporter and counsel. Will you state your full name, please?

A. Adolph John Schnee.

Q. Where do you reside, Mr. Schnee?

A. At the present time, San Francisco.

Q. What is your age?

A. Twenty-eight.

Q. Are you a married man? A. Yes.

Mr. Thompson: I object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: Answer. My understanding is he answered yes.

Q. On August 29, 1946, what was your age?

A. Twenty-five..

Q. What is your birthday?

A. September 20, 1921.

Q. Directing your attention to the 29th of August, 1946, [4] it has been stipulated you were engaged as a Signal Maintenance Man, is that correct?

A. Yes.

(Testimony of Adolph J. Schnee.)

Q. For the Southern Pacific Railroad Company, the defendant? A. Yes.

Q. Now, Mr. Schnee, where was your headquarters in that capacity?

A. The divisional headquarters was at Tucson, Arizona.

Q. And out of what yard or place did you work? What was your home base, if we may call it such?

A. Willcox, Arizona.

Q. And that is the city that is some eighty-five miles distant from Tucson, is that correct?

A. Yes, sir.

The Court: Which way?

Mr. Gillen: I think it is due south, is it not?

The Witness: I think it is in an easterly direction.

Q. An easterly direction from Tucson. Would that be railroad west from Tucson?

A. No, I think it is railroad east from Tucson.

Q. Are you familiar with motorcars, so called, used in railroad work? A. Yes, sir.

Q. Will you describe, as best you can, from your recollection what a railroad motorcar looks like?

A. To begin with, it has got four wheels for traction on the rails.

Q. Are they flanged wheels, they fit like a railroad wheel?

A. The flange on it is a lot less in size than on a normal railroad car.

Q. I say it is a flanged wheel?

A. It is a flange, slightly flanged.

(Testimony of Adolph J. Schnee.)

Q. All right.

A. And on the axles upon which the wheels turn it mounted a frame.

Q. Mounted the frame.

A. The frame of the vehicle. I do not recollect whether the frame is iron or steel or wood, it has been a long time. And in the frame is mounted a small horsepower engine. I would think it is around a horsepower, around that, perhaps less; and around it is built a sort of hood to cover the moving parts from the top, but the bottom is completely open.

Q. Underneath the car?

A. Underneath all the moving parts are open in order to turn the car over to look at it, to inspect it, and alongside of this hood are sunken platforms, that is, they are constructed, I believe, to serve as a tool well.

Q. Tool well?

A. I term it that. I forget the correct term.

Q. Pardon me, are those two tool wells on either side of the [6] superstructure?

A. On either side of the structure. In addition, I believe at the end of this platform or sunken well is a vertical projection something like a board; whether it is a board or a steel plate——

Q. A partition?

A. A partition, yes. And in addition, directly above the wheel are small incidental fenders. Now the various gadgets to operate this car, to start it

(Testimony of Adolph J. Schnee.)

with or to stop it, are to be gained access to from the seat of the operator and they are located in the middle of this hood or structure. In addition, there is mounted on the front frame—it is a frame, I believe, that is in the front as well as in the back—that is constructed from one side, that is, from one end of one platform over the hood or structure or above it to the other side. I don't think it is in a circular fashion, it may be square, and on the front end of the car, the radiator end, there is an enclosure, I forget whether it is canvas or wood, stretched on this frame or mounted on this frame and on the frame is a light directly in the center somewhere thereabouts to assist you on jobs you go to at night; in addition there is a small rear light.

Q. Also mounted on the frame?

A. Also mounted on the frame.

Q. I see. [7]

A. But to the rear, to my recollection, there is no enclosure other than the plates or wood partitions I spoke of and there is various standard equipment supplied with each car to be used in case of emergency. I believe there are flares contained in these boxes attached to these frames, back and front, and a flag, I believe.

Q. Now, the car can be operated in either direction?

A. The car can be operated, in fact, it is so constructed to make the operation not only possible but I believe I have seen it used that way many, many times before I was elected to this job.

(Testimony of Adolph J. Schnee.)

Q. Now, you have in mind, do you, the date of August 29, 1946, as the date of the accident?

A. I do.

Q. Did you work as a Signal Maintenance Man on that day? A. I did.

Q. What time did your call of duty commence on that day, if you remember?

A. I think it was 8 o'clock.

Q. Eight o'clock in the forenoon, morning?

A. Eight o'clock, yes.

Q. When was your scheduled lunch hour on that day, if you can recall?

A. From 12 to 1 o'clock.

Q. From 12 to 1 o'clock; did you busy yourself about your [8] employment as a Signal Maintenance Man that morning? A. I did, sir.

Q. All right. Now, did you go to lunch that day?

A. I did.

Q. You returned from lunch, I take it, in the neighborhood of 1 o'clock?

A. At 1 o'clock, before working hours started.

Q. Now, directing your attention to the time when you returned from lunch, approximately one o'clock or a few minutes before on August 29, 1946, can you tell us what, if anything, you did with relation to picking up and continuing your employment, your work that day?

A. Immediately after finishing my lunch and starting out at 1 o'clock I proceeded to my motor car, the motorcar assigned to me which I had secured

(Testimony of Adolph J. Schnee.)

or parked directly in front or back, I don't know which is front, of a box car the company provides for a maintainer to live in or use as living quarters, whereupon I walked about the car to see that I had all my tools in it to see that the sweeps—I put them down.

Q. Will you explain what the sweeps are?

A. The sweeps are attached to the radiator end of this motorcar.

Q. What do they consist of and what are their functions?

A. It is merely a rod extended across in a horizontal position and at the end of this rod there is mounted a rubber [9] hose that is on each end; the rubber hoses are pieces around four to six inches long and perhaps an inch and a half in diameter. These rubber hoses are mounted on this rod permanently. In other words, as you turn the rod the bushing is mounted on the frame, as you turn it, this rod, you would also turn, of course, the rubber hoses, they would move in a circular fashion along with the rod.

Q. I see. Now, coming to your car you walked around your car and made an inspection of it, is that correct?

A. Yes, sir.

Q. Then what did you do?

A. Upon seeing that everything was in shape and did have the tools in place in the tool wells that I intended on using—I believe there is some permanent equipment on there, namely, rags and such in

(Testimony of Adolph J. Schnee.)

it, make sure they were closed and I had my schedule and so on.

Q. What was your schedule, a sheet that indicated to you what particular signals you were to visit?

A. I had a schedule made out that would more or less give me something to go by to do various jobs, yes. I put these sweeps down, because normally when you park this car you leave it in an upright position because when you go across a switch or frog from one track to another at times they move out of position.

Q. So you put the sweeps down? [10]

A. Yes, sir.

Q. Then what did you do?

A. So I did not mount the motorcar, I pushed it through this switch, I think it was a second siding from the main line, very small track in length.

Q. All right.

A. From there I went onto the siding that is the second siding, the one immediately parallel to the main line.

Q. All right.

A. And from there I proceeded along this siding until I reached the end of it and again pushed the car onto the main line.

Q. All right, at what point did you reach the end of that siding immediately parallel to the main line?

A. The point is railroad west of Stewart Street, I believe, it has been a long time.

(Testimony of Adolph J. Schnee.)

Q. Is it railroad west or railroad east of Stewart Street?

A. This point of the block signal may be east of Stewart Street.

Q. In all events you reached that signal. Now, is there a crossover switch from the siding to the main line?

A. At each of these crossovers the point going from the siding to the other parallel siding of the main line onto the main line is a hand switch with a lock attached to it.

Q. Did you push your car onto the main line track? [11]

A. I pushed my car onto the main line track.

Q. What did you do then?

A. I forgot to mention while going along this parallel siding I had started the motor of the car.

Q. Then what did you do then when you got to this crossover track and pushed it onto the main line?

A. I did, of course, mount the car, that is, take the seat that is provided and I forget now—I don't think you have to push it once the motor is running. It is a belt drive and you guide it as you pull a lever towards the operator.

Q. Did you start up the operating of the car sitting in a position?

A. I started the operating of the car while being on it.

Q. Which way were you headed at that time?

A. I was heading railroad east.

(Testimony of Adolph J. Schnee.)

Q. Which way was your car heading at that time, was the front or back toward railroad east?

A. The front end, radiator end as I mentioned before was headed railroad east.

Q. In other words, the car was headed in the direction in which you were going, is that correct?

A. Yes, sir.

Q. Did you proceed to any point before stopping?

A. Did I proceed to any point before stopping?

Q. After you started you said you got on the main line, [12] started to operate your car, put it in gear, if that is what you call it; did you reach any point before stopping the car?

A. Of course I went out to this signal in question.

Q. All right. Can you identify the signal in any way for us? A. I cannot recall the number.

Q. Can you give us the approximate distance of the signal from the Willcox yard from which you started?

A. I believe the distance was somewhere between one and two miles railroad east.

Q. One and two miles railroad east of Willcox?

A. Willcox.

Q. All right. At that signal what, if anything, did you do?

A. When I arrived at the signal of course the first thing I did was stop the motor of the motorcar, put on the brakes and dismount the car. I dis-

(Testimony of Adolph J. Schnee.)

mounted from the car and went to the signal immediately adjacent to the tracks—and I don't believe I had to unlock this box.

Q. The box on the signal pole?

A. Yes, because I had been at this or looking at it or stopping by this box, I think, during the course of that morning and I had known—no, I didn't either, I unlocked this box.

Q. All right. You unlocked the signal box.

A. I unlocked the signal box.

Q. All right, then what? [13]

A. I went to assure myself of the lightning arresters being in the hole. I might have to explain this.

Q. Explain what lightning arresters are.

A. Lightning arresters are a small disc from one side, from the flat side looking at it, with a hole in it and it is about, oh, I don't know, a quarter of an inch or half an inch thick and it is constructed of carbon and you use it, I believe, to protect your relays in different electrical mechanisms that make up the signal, railroad signal, as you commonly see it along the line. And the reason I did that was because at that time there had been storms out there, lightning, rain and so forth and it is a precaution I took to keep from having operational trouble of the whole mechanism.

Q. By the way, what was the condition of the weather that afternoon as you started out on your first trip to this signal?

(Testimony of Adolph J. Schnee.)

A. I think it was drizzling.

Q. Drizzling? A. Yes, sir.

Q. That is your best recollection?

A. That is my best recollection.

Q. Was the ground damp?

A. Well, I couldn't say that because I was mainly traveling on a railroad bed and it is hard to determine looking at the countryside whether it was wet or not, but it was drizzling when I started out, I remember that. [14]

Q. When you inspected the lightning arresters on that signal, what, if anything, did you observe or do about it?

A. Of course the first thing I wanted to do was get this material I needed, that is the lightning arresters, from the motorcar and at the same time move it off the tracks.

Q. Did you discover anything wrong with the arresters on that signal?

A. Oh, yes, I forgot to mention.

Q. What did you discover?

A. I believe there was one, two or three, I forget the number, of defective arresters which I wanted to replace immediately when I saw they were defective, cracked.

Q. By the way, do you use any particular kind of tool to install or replace such an article?

A. Yes, you have got to have a special cylindrical tool with a hexagon on the inside of it or each end, one of which fits, I don't know what, a three-eighths

(Testimony of Adolph J. Schnee.)

or standard anyway, and the other fits a smaller nut. The reason you have to have a cylindrical tool, these lightning arresters are mounted in banks and each specific support, of course, is locked next to the next one and to get in there you have to have that cylindrical tool.

Q. Upon discovering three defective arresters, these insulator plates you talked about or gaskets, cylinders, you set about to replace them? [15]

A. I set about to replace them, in fact, I went so far as to loosen the lock nut. See, there is two nuts holding the wire in place where they come into the support onto this bank and there is one nut, I believe, on the very base of this stud, or screw, sticking out of the mounting and the wires have a lead soldered to them and slipped onto this stud and, of course, would be away from the base of the bank. On top of this lead is a nut with which you tighten the wire to the base nut, clamp it together and on top of this second nut is a third one, I believe I mentioned about this lower one. This top one served to lock it.

Q. You loosened that?

A. I loosened that, I am sure.

Q. What did you next do?

A. I had in mind getting to the car, getting the material and taking the car off the tracks and getting to the job.

Q. Did you go to your car?

A. I did go to my car.

(Testimony of Adolph J. Schnee.)

Q. Did you make any inspection to determine whether or not you had the material you needed?

A. I looked for the material, I thought that I had it in place where I usually carry it and some nuts to fit this various equipment, because sometimes you drop them between the battery or inside where you are working in the box of the signal—— [16]

Q. Let me interrupt you. Without going into the mechanical aspects of it you made a search to replace the defective ones?

A. Yes, I think I had some kind of container in my tool box where I had a lot of this little stuff in there in case I dropped one in the grass.

Q. All right. Did you look all over your car?

A. I looked in there; I couldn't find one. I thought I had it in there; when I didn't find one in this container or in the tool box I wanted to look around, that is, I inspected the tool wells on each side of the car and I even went so far as to look in some of the containers they have to keep the rags in, I think there is a box in the back.

Q. Were you able to find what you were seeking?

A. No, sir, I couldn't find it.

Q. Had you taken your car off the track up to this time?

A. No, I had the car on the track right near the signal. I may say at this time I was also keeping a good lookout, a good lookout for any movements, you see, of the trains, because that is important.

(Testimony of Adolph J. Schnee.)

Q. That is, the appearance or approach of a train? A. That is right.

Q. When you found you didn't have these parts . . . you needed what, if anything, did you do then?

A. Then I got on the car. First of all I released the brake because you can't budge the car until you release the [17] brake and I mounted—no, you don't mount the car, you have to push it. You start it by running alongside the car—no, by running directly aft between the rails to push it in that manner, since it is unsafe to do that.

Q. Did you do that? A. Yes, sir.

Q. That was to get it started? A. Yes, sir.

Q. Which way did you push your car, toward Willcox again?

A. Towards Willcox, yes, sir.

Q. That would have been railroad west?

A. Railroad west.

Q. Which way was your car facing when you started to push it toward railroad west, toward Willcox to get the parts?

A. The car would be facing towards Bowie, that would be railroad east, yes, railroad east.

Q. In other words, you were backing up to Willcox, is that correct? A. Yes, sir.

Q. Did you board the car and drive back to Willcox?

A. After I had the motor running you stop the car after the motor is running and mount it.

Q. You mounted it and backed up to Willcox, drove it in reverse into Willcox, is that correct?

(Testimony of Adolph J. Schnee.)

A. Yes, you call it reverse, I suppose. [18]

Q. So that the front of your car was still facing railroad east, the back was facing railroad west and you were traveling at this time railroad west, is that correct?

A. Yes, sir, toward Willcox.

Q. When you got back to Willcox did you retain your position on the main line rail with the car or put it on any other rail?

A. I didn't maintain my position, as you put it, on the main line, because the tool shed is adjacent to a siding, one that there isn't any traffic on, and the way I did this was to take advantage of a cross-over, that is a rail that takes off from the main line onto the siding and I stopped there. Of course, first you have to get off and I left the motor running and I pushed it through this switch—there is a switch too—yes, I pushed it through the switch onto this siding, then I mounted the car again—but before I did I noticed—of course, I made it a habit to notice that the spark——

Q. Leaving the mechanical details out, did you finally get it to the tool shed?

A. Yes, sir, I went from there directly on this same siding that goes right along the front of the station, the Willcox station and right past the station going towards Tucson is the tool shed or work shed where I keep the equipment.

Q. Did you park anywhere in the close proximity to that [19] tool shed?

A. Directly in front of it.

(Testimony of Adolph J. Schnee.)

Q. That was on the siding? A. Yes, sir.

Q. Was that the siding immediately parallel to the main line? A. Yes, sir.

Q. Did you go into the tool shed?

A. I did go in the tool shed, yes, sir.

Q. Did you find any articles there you needed?

A. Well, the reason I did go on the siding first——

Q. Just a moment, answer my question. Did you find any articles you needed in the tool shed?

A. Yes, sir, after I made a search.

The Court: We will recess until 1:30.

(Whereupon a recess was taken at 12:00 o'clock until 1:30 o'clock p.m.)

The Court: Do you have the marshal and others from Douglas available?

Mr. Gillen: Yes, sir, and I have some depositions, so we won't lose any time.

The Court: The way I feel now I think we should try the cause of liability first and after that aspect you can put your other witnesses on.

Mr. Gillen: Interrupt the witness' testimony as to [20] any injuries?

The Court: That is right.

Mr. Gillen: Then I might have to have a moment to phone, because I was planning those witnesses at a reasonable hour.

The Court: That is what I was planning on, have your colleague call them so we can get along. Of

(Testimony of Adolph J. Schnee.)

course, your people for the defense will be here all the time?

Mr. Henderson: Yes, sir.

Mr. Thompson: I don't have them in the corridor, Your Honor, but I can have them here in five minutes.

(Last question read.)

Q. (By Mr. Gillen): Did you take the supplies you needed and start out again? A. Yes.

Q. Railroad east back toward the signal you were going to work on? A. Railroad east, yes.

Mr. Thompson: Your Honor, I don't want to interrupt counsel, but I wish he would refrain from leading.

The Court: He is going all right. I give plaintiffs lots of leeway.

Mr. Gillen: I wish to avoid detail.

The Court: Put it another way.

Q. (By Mr. Gillen): Which way was your car headed when you [21] started back to the signal from Willcox?

A. The radiator would be the front, headed railroad east.

Q. The front would be headed railroad east?

A. Yes, sir.

Q. Do you have any recollection now by which you could form an estimate as to what speed you were traveling just prior to the time the accident occurred?

(Testimony of Adolph J. Schnee.)

A. Oh, I would say around seventeen miles an hour as best I can judge.

Q. About seventeen miles an hour?

A. That is right.

Q. Now, what were you doing as you were traveling along railroad east with your car headed that way, about seventeen miles an hour, approaching that signal, with relation to making any observations, anything of that sort?

A. Well, of course—you mean from the time I got on the car?

Q. No. We have got you now on the road away from Willcox traveling about seventeen miles an hour, your car traveling in a railroad easterly direction and you are approaching or going toward the signal you are going to work on. A. I see.

Q. What were you doing as you drove, tell us where you were sitting, what you were doing

A. I was sitting on the seat provided for the maintainer, [22] which is on the left-hand side in this case facing east or facing with the front end of the car, east.

Q. All right.

A. And I was watching the railroad signals.

Q. Why were you watching the railroad signals?

A. It is an indication if there are any trains approaching.

Q. What else were you doing?

A. In addition to that I was watching the horizon for smoke, which is also an indication for trains approaching.

(Testimony of Adolph J. Schnee.)

Q. Were you watching anything else?

A. Well, of course I was watching making sure that the track was clear.

Q. All right. Now, as you were proceeding along in the manner you have described at the speed you have described, did anything of an unusual nature come to your attention by way of sensation, noise, movement or anything else? Answer that yes or no.

A. Yes.

Q. Will you just describe for the Court and Jury what it was that occurred that came to your senses of feel or sight or hearing or whatever it was?

A. Well, the sensation I had, the last sensation I had before I don't remember anything was a jolt, a jar, an abnormal movement of the car.

Q. When you say an abnormal movement of the car, can you [23] describe it?

A. It felt as though it was leaving the track or not running on the track just for an instant.

Q. I see. What else?

A. It was merely this one instant I was conscious of.

Q. When you say it was leaving the track, did your sensation indicate to you that the movement of the car was to one side or to the other, backward, forward or up?

A. It was up more than sideways, instead of sideways movement. You generally always have sort of a fishtail's movement.

Q. Let me understand, you always have sort of sideways movement, sort of fishtail's. Do you mean there is a sort of sway?

(Testimony of Adolph J. Schnee.)

A. There is plenty of clearance provided, because the weight of the car wouldn't be enough to keep it on the track even with all the traction it would scrape the car, the wheels from either side.

Q. So there is some side to side play in the car as it goes along normally; you say this was a different sensation, more upward than anything else?

A. Up.

Q. Can you describe that any better for the Court and Jury?

A. I think it something like coming up the other side of a dip in an automobile, you feel like you are going to stay [24] up there.

Q. You lifted? A. That is right.

Q. Did you lift, the car lift altogether, what was your sensation?

A. Naturally I was sitting right on the car. It sort of came from the bottom, that is, pressure, a sudden jolt caught me from the bottom like somebody pounding on this chair and lifting it up.

Q. The car lifted? A. It felt like that.

Q. What happened to you, if you know?

A. To me?

Q. Yes. What was the next sensation you felt or what other sensation did you experience, if any?

A. The sensation I experienced of arousing from a sleep.

Q. Now, before we get to that, when you felt the car jolt and lift were you conscious of leaving the car or were you conscious of falling to the ground,

(Testimony of Adolph J. Schnee.)

being thrown to the ground, being thrown in the air, anything else?

A. No, sir. No, sir, I felt as though at the time that the instant I was sitting on the car there as though I was moving sideways or one way or the other. I felt a jolt coming from the bottom up, a lifting sensation.

Q. Do you remember any more until you recall a sensation [25] as though you were arousing yourself from sleep?

A. That is right. No, I don't recall anything between that and the last sensation I just described, that jolt.

Q. Were you blacked-out? Were you unconscious so far as you know?

A. I must have been.

Q. Do you know how long you were unconscious before you felt yourself rousing?

A. I myself couldn't say.

Q. You say the next sensation after the bump and lifting sensation you describe while you were sitting on the car traveling along, was a sensation such as one feels when coming out of a sleep?

A. That is right, with an effort.

Q. Outside of coming to consciousness did you feel any other sensation in the way of discomfort, pain, or anything else?

A. Sure. I tried to get up then, I had the pain in my ankle, of course.

Q. Which ankle is that?

(Testimony of Adolph J. Schnee.)

A. This right ankle, that I experienced after I tried to get on my hand. I remember lying down, trying to get on my hand and right there I experienced pain.

Q. Where? A. Right in this hand.

Q. You were indicating the left hand?

A. Left hand.

Q. All right.

A. Then I tried to arouse myself; by doing that I tried to get on my left knee; the pain there was so terrific I couldn't get on the left, I don't think I was able to bend it.

Q. Your left knee gave you pain?

A. Yes, sir.

Q. All right.

A. Naturally I couldn't get up.

Q. What other sensation did you experience?

A. I felt as though I wanted to go back to sleep. I couldn't hear noises, that is, I felt by moving around I was moving in a vacuum. I couldn't hear the noise I was making from disturbing the gravel, ground or bushes, whatever it was; that seemed strange to me. Also, my eyesight failed me quite a bit, everything looked blurry to me.

Q. By the way, let me interrupt you. Prior to the accident on August 29, 1946, did you wear eyeglasses? A. No, sir.

Q. Had you been examined by the railroad? Had you had a physical examination by the railroad?

A. Yes. With the physical examination they give you an eye test.

(Testimony of Adolph J. Schnee.)

Q. Were you given a physical examination at the time you [27] were employed by the railroad?

A. Yes.

Q. How long before this accident was that, two weeks, a month, two months?

A. Two months and some odd days.

Q. Two months and some odd days prior to the accident?

A. Yes.

Q. Do you know what your vision was the last time you had your eyes tested?

A. I believe it was 20/20.

Q. Do you know?

A. Yes. Yes, because I think that was one of the requirements. If you didn't have that you had to have glasses. I know when I left the service I had 20/20 because they give you a thorough examination.

Q. You say your eyesight was blurred; did you experience any other sensation?

A. Well, my head felt like someone pounding it with a sledge hammer.

Q. Was it painful?

A. Not a sharp pain, felt like a dead weight on it.

Q. No sharp pain. Was it a dull pain?

A. Dull and pressure all over.

Q. Did you note anything about your mouth at that time?

A. Felt I couldn't move my body—— [28]

Q. Did you note anything about your teeth at that time?

A. No, sir.

Q. Did you subsequently note anything about your teeth?

A. Yes, sir.

(Testimony of Adolph J. Schnee.)

Q. What did you note about your teeth?

A. About a week after the accident I found out I was minus four teeth.

Q. Uppers, lowers or where?

A. One and a half uppers and two lowers.

Q. You have described to us your head felt as though there was a weight on it; and if I am not mistaken you said there was a dull pain but not a sharp pain in your head, is that right?

A. Yes. I think it was a general pressure pain; not in any particular one spot.

Q. As to your neck and shoulders, did you feel any sensation in your neck and shoulders either at that time or within the next little while?

A. Not within the next little while.

Q. All right. With relation to your hands did you notice any discomfort with either or both of your hands?

A. Yes, as I mentioned.

Q. With relation to your abdomen did you notice any discomfort about your abdomen?

A. Yes, I felt as though someone had knocked me a good [29] wallop in the stomach.

Q. Did you feel any sensation about your lower extremities, any discomfort?

A. At that time the only thing, I felt like I had been beaten up all over and these sharp pains and the feeling of extreme pain never came until three weeks after and has lasted ever since in various parts of my body.

Q. After you observed or noticed these sensations

(Testimony of Adolph J. Schnee.)

you have described here did you make any observations with relation to your immediate surroundings?

A. Yes. I remember coming to, trying to get up and when I couldn't I remember crawling.

Q. How did you crawl? Can you describe to the Jury how you crawled?

A. Yes, on my elbows.

Q. Can you tell us why you crawled on your elbows rather than any other manner?

A. That is the only means of locomotion, so to speak, that was possible.

Q. Why?

A. It was instinctive to me, because anything else I touched, my left hand, foot or anything wouldn't work or would be painful.

Q. Now, when you regained consciousness did you make any observation with relation to what happened or where the motorcar [40] was?

A. I don't know whether I had remained right on it, because I was close. It seemed to me I was near it or at least I could see it when I came to. When I first remember coming to from this sleep I mentioned, seemed like a sleep——

Q. You noticed the motorcar? A. Yes, sir.

Q. Did you form any estimate in your mind where the motorcar was with relation to you?

A. In relation to me it was directly in front of me.

Q. Do you remember whether you remained conscious or lapsed into unconsciousness again or re-

(Testimony of Adolph J. Schnee.)

gained consciousness again any number of times, one or more times?

A. I can. I can remember many times of the same sensation, coming to and feeling a weight and my body dragging me down and feeling like staying there and to heck with everything else.

Q. Do you know what time it was, whether it was on your regaining of consciousness of the first time or some subsequent regaining of consciousness what position the handcar was in on which you had been riding?

A. No. After I first came to and seen the car, especially in my mind I knew first when I came to it was a motorcar, was the yellow paint hit me right in the eyes and that was a good perception of anything I seen. [31]

Q. Did you take any note or are you conscious of any recollection as to whether the motorcar, whether it was on that occasion you saw it, regaining consciousness first or some subsequent time, whether it was on the track or anyplace else?

A. It couldn't have been on the track.

Q. Did you notice? A. I didn't, sir.

Q. You say you started to crawl on your elbows, use your elbows to propel you along the ground?

A. That is right.

Q. Did you notice anything with relation to any blood on you or about you when you first came to?

A. My color perception was pretty poor; my face was caked up with something.

(Testimony of Adolph J. Schnee.)

Q. Did you notice whether it was a light or dark substance or did you notice anything on the ground about?

A. The only thing I have a sensation of I think it was muddy, it was ground.

Q. Did anything else come to your attention that caused you to attempt to bring yourself, take yourself in that direction?

A. I tried to take myself in the direction of the motorcar. I remember trying to get to it.

Q. Trying to get to the motorcar?

A. Yes. [32]

Q. Did you ever reach the motorcar?

A. Not to my recollection.

Q. Now, do you remember doing anything else with relation to helping yourself?

A. I gave myself a good talking to.

Q. Do you remember anything else you did?

A. I remember trying to keep awake in every way possible.

Q. Trying to keep awake? A. Yes, sir.

Q. Did any sound or sensation come to your attention that had any significance for you?

A. There is the sound of exhaust from automobiles; there is what sounded like a train.

Q. Sounding like what?

A. Sounding like a train.

Q. What did you do then with relation to assisting yourself any further, when you gave yourself a good talking too, tried to discipline yourself to keep awake, what else did you do?

(Testimony of Adolph J. Schnee.)

A. I remember trying to crawl to the highway, because I had observed it to be parallel to the tracks prior to the accident.

Q. You wanted to get to the highway?

A. That is right.

Q. Why did you want to get to the highway?

A. I felt someone would be kind enough to assist me.

Q. Were you conscious of whether you got to the highway or [33] not? A. No.

Q. You were not conscious whether you got to the highway? A. No.

Q. What, if anything, do you next remember, that you are next conscious of?

A. The first voice I was conscious of was someone, lady or man, I don't recall, saying he was either dead or drunk.

Q. He is either dead or drunk? A. Yes.

Q. You don't know who they were?

A. No, sir.

Q. You don't know whether it was a man or woman's voice? A. No, sir.

Q. What were you next conscious of?

A. I was conscious of two persons talking and I was conscious of someone lifting my head, I believe, and someone trying to move me; of telling them it was extremely painful.

Q. You are conscious of telling someone——

A. I would say hollering.

Q. Hollering you were in pain? A. Yes.

(Testimony of Adolph J. Schnee.)

Q. What were you next conscious of?

A. Next I was conscious of these two persons talking. I couldn't see them although when they, or he, or she lifted my [34] head they must have been right over me. I never saw their faces.

Q. Don't speculate on what happened, just tell us what you were conscious of. Were you conscious of anything else after that?

A. No, I don't remember anything until in the doctor's office someone said hand me some medical instrument, something about blood plasma, someone turning heck out of my foot, working on my ankle.

Q. Do you know where that was, whether in Willcox or whether in St. Mary's Hospital in Tucson, do you know where?

A. It must have been Willcox.

Q. Just a minute. I don't want you to tell me what it must have been, do you know where?

A. No.

Q. You are conscious of someone working on your foot? A. Yes, and my head.

Q. What was the next thing you were conscious of?

A. Moving in a dark room, it seemed to me.

Mr. Gillen: I think, Your Honor, that just about covers the point of liability.

The Court: All right, cross-examine, gentlemen.

I am taking this in hand, gentlemen of the Jury, so we will present what we call the issue of liability first rather than go ahead with these injuries. I am putting that off for [35] a little while.

Mr. Henderson: Under the provisions of the Federal Rules I believe we have the privilege of calling the adverse party and if the Court will permit it I would prefer to do that at this time rather than go ahead.

The Court: On your case.

Mr. Henderson: Yes, sir.

The Court: Do you have another witness available?

Mr. Gillen: Mr. Scruggs has reached the witnesses. They are on the way and should be here momentarily.

Your Honor wishes the plaintiff to step down off the stand?

The Court: I think so.

DICK HALLMARK

being called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gillen:

Marshal Hallmark, the Jury is to the right alongside of you and I will ask if you will be kind enough to keep your voice up so everybody will be able to hear you.

The Witness: I will be glad to do so.

Q. May I have your full name, please?

A. Dick Hallmark.

Q. May I ask what is your business or official capacity? [36]

(Testimony of Dick Hallmark.)

A. City Marshal, City of Willcox.

Q. City Marshal, City of Willcox; that is in the State of Arizona? A. Yes, sir.

Q. That is a distance from Tucson where we are now about how many miles?

A. Eighty-four miles, approximately.

Q. In what direction?

A. It would be considered generally east, I would think.

Q. As City Marshal you have the capacity of Police Chief or police officer in that community?

A. Yes, sir.

Q. How long have you been such, please?

A. Four years.

Q. Four years? A. Yes, sir.

Q. Were you such in the month of August, 1946?

A. I was.

Q. Directing your attention to the date of August 29, 1946, and I will identify that as a date when you encountered an injured man in the course of your official duties, do you recall anything being brought to your attention about anyone being injured on the nearby highway?

A. Yes, sir. I was standing on the corner there at a Chevron station known as Porter Fox's Chevron Station talking [37] to Mr. Singleton.

Q. Can you tell us who is Mr. Singleton?

A. He is just an acquaintance of mine in Willcox. I have known the man quite a while. He is very well known.

(Testimony of Dick Hallmark.)

Q. One of the citizens of Willcox?

A. Yes, sir, an old timer there, when a car approached very hurriedly and I heard the lady call out, "There is an officer there." Naturally I stepped over to the car to identify myself; she said, "For God's sake, quick, officer, there is a man out here, I don't know what has happened, looks like he is torn all to pieces. He is all covered with blood." I said, "How far out?" She said, "About a mile and a half." My car was standing handy.

Q. Were you wearing some badge of your official position?

A. Yes, my full gear and badge of identification.

Q. And a weapon on your person?

A. Yes, sir.

Q. All right. I don't want to get into hearsay as to what was said between you and Mr. Singleton out of hearing of any representative of the defendant company, but as the result of this information that was given to you did you proceed to the scene?

A. I did, immediately.

Q. Were you accompanied by anyone?

A. I asked Mr. Singleton to accompany me in case I needed [38] assistance.

Q. You went in your own automobile?

A. Yes, sir.

Q. How were you directed to the scene?

A. I followed this couple out, this tourist, I followed them out to the scene.

Q. In other words, they led the way to lead you to the point?

A. Yes, sir.

(Testimony of Dick Hallmark.)

Q. Arriving at the scene what, if anything, did you observe? What first came to your attention when you arrived at the scene?

A. A man, as I figured, with no chance of life.

Q. I see; why do you say that?

A. Because the man was all covered in blood, a terrific hole in the top of his head and his limbs were in such condition I figured they were broken up pretty badly and all I could get from the man was a moan. I seen there was life and I asked for an ambulance.

Q. How did you ask for that ambulance?

A. I sent this same party assisting me, asked them to go back with him. The reason they went back with me, this lady says the man is in the tall grass and you might miss him and I know right where he is, which is true, the grass is some eighteen or twenty inches high. It was very hard to see the [39] man if you didn't know where he was. I asked them to hurry back and send me an ambulance at once.

Q. In other words, you dispatched your informants back to Willcox to get an ambulance?

A. That is right.

Q. When they left to get an ambulance what, if anything, did you do?

A. The first thing I did, Mr. Singleton and I broke down sufficient grass to raise the boy's head up to a level with his body, due to the fact that the ground is very unlevel there and his head was way

(Testimony of Dick Hallmark.)

low. I think I tried to move him over to a more comfortable position and he gave an outcry of pain and we broke down sufficient grass to raise his head to a level with his body.

Q. That is a makeshift pillow? A. Yes, sir:

Q. What, if anything else did you do then?

A. I saw the direction from whence he had come, due to the drag where he had dragged himself along like a wounded animal through the grass and mud. The ground in the lower places was filled with water, it had rained that afternoon. I looked over to the railroad track and I observed this motorcar; from where I was at the time I didn't know the position exactly and I turned to Mr. Singleton—I looked to the east and a passenger train was coming down the hill about a mile and a half or [40] two miles away and this car would be partially hidden, I was afraid, by a clump of brush, bushes; I said to Singleton, I said, "You make the boy as comfortable as you can and I will go over and see if that car is in the clear, I believe that is where the accident occurred."

Q. See if the motorcar was clear of the track so it wouldn't interfere with this train you saw coming?

A. That is right. I was afraid the bushes would hide the car until it was close and the engineer wouldn't have time to stop the train. Upon arriving at the scene I saw the car was in the clear where the train could pass.

(Testimony of Dick Hallmark.)

Q. May I interrupt you, Mr. Hallmark. You say you saw the car was in the clear, you mean by that it was completely off the main line track?

A. Yes, sir, completely off the track.

Q. All four wheels resting on the soil alongside the right of way. A. Yes, sir.

Q. Pardon me for interrupting you. What, if anything, did you do then?

A. I rushed back, I heard the ambulance, heard the siren coming and I rushed back and assisted them in loading the boy in the ambulance.

Q. Did you know that young man before that day?

A. I had only seen the boy working on the line there. I [41] hadn't been introduced to him, no, sir.

Q. After you had loaded him into the ambulance with the assistance of others what did you do then?

A. I gave directions where to take the boy and I turned to Mr. Singleton, I said, "Come go with me over and let's kind of check." I said, "That is, I am pretty sure, where the accident occurred."

Q. Did you and Mr. Singleton go back over to the location? A. We did, sir.

Q. Will you just describe what, if anything, came to your notice and attention at that time?

A. Well, in following the tracks back from the car, which is something you always do in an accident, you try to find out the cause of the accident if possible.

Q. Yes, sir.

(Testimony of Dick Hallmark.)

A. We followed it back, I think it was seventy-three crossties.

Q. Seventy-three crossties?

A. I believe that was the correct number. It has been so long ago I might make a mistake as to the number, but it was quite a ways back; and I had seen where the car left the tracks to the north. The car was traveling east or generally eastward at that point—it may not be directly east and west; it is considered east, and it angled up the tracks. We could follow the flanges where it hit the crossties. [42]

Q. You say the flange, you mean the flange of the motorcar had left its mark on the crossties?

A. Yes, sir.

Q. The wooden crossties?

A. Yes, sir. You see, it left the track to the left as it was going east and they angle up the track, it must have been some sixty-five, perhaps, ties.

The Court: Straddling the north rail?

The Witness: Yes, sir, it was straddling the north rail at that time and at that point. I don't know the exact figures, but it was in the neighborhood of sixty or sixty-five ties from where it left the track, the right wheels apparently came into contact with the bolts that fixed the rails together and the fishplate.

Q. Hold them together?

A. Yes, sir. They are alternated, you know, one head being one way and the other head the other

(Testimony of Dick Hallmark.)

way and apparently the wheel of the motorcar struck this bolt and it threw the entire car then to the left of the track or north of the track, being the right wheels over the left rail and leaving the car completely off the track to the left and it proceeded, oh, the best I can recall twenty-five or thirty feet before it came to rest. And directly across from where the car was resting, I believe almost even with the front of the car as I term it, I noticed a puddle of blood and in observing I saw that was [43] apparently where the boy's head had struck a fishplate where it was protruding out over the cross-ties. I am sure that catapulted, it catapulted the boy from the handcar and naturally proceeded in the direction he was going and it looked as though his head struck directly against the rail and this protrusion of that fishplate, whatever they call them under the rails, resting on the ties, the corner was sticking out between an inch and an inch and a half. It was overhanging this side of the rail.

Q. I see.

A. Then from signs of blood, of course, there was ballast there; by close observation you could see where there had been some of the ballast turned over. He dragged himself back, oh, I believe I would be safe in saying thirty feet along the south rail back to the west. He crossed directly over to the north of the north rail. Anyhow, he was dragging himself, you could see where he clawed in the ground with his fingers and pulling with his elbows

(Testimony of Dick Hallmark.)

back to the car, right to the handcar or motorcar and there then he turned northward to the highway, a distance of, I judge, around nine hundred to one thousand feet. He dragged himself through the grass going through or under highway fences in a zigzag way over to within five feet of the shoulder of the highway. He was in the bar pit lying in the grass right near the bar pit. You could trail him by the blood where he had dragged himself through the mud. [44]

The Court: What time was this?

A. It was in the afternoon. I don't recall the time, but it was in the afternoon, I imagine around four o'clock. I don't recall the exact time, sir.

Mr. Gillen: Around four o'clock in the afternoon. Now, did you observe anything that indicated this substance, other than your perception of it, that indicated this substance was blood? Did you observe any rodents or animal life?

A. Yes, I did.

Mr. Thompson: I object, Your Honor, for leading.

The Court: Sustained for another reason. Ask another question. You know it was blood, Marshal? You know it was blood?

A. To the best of my ability, Your Honor, it was.

The Court: You said nine hundred to one thousand yards in your statement awhile ago; you meant feet?

(Testimony of Dick Hallmark.)

Mr. Gillen: I did, Your Honor.

The Court: Let's straighten it out.

Q. (By Mr. Gillen): Can you tell us your approximation after he left the handcar whether his trail was one thousand yards or one thousand feet?

A. Feet.

Mr. Gillen: I stand corrected.

The Witness: That is in a direct line. Of course, he didn't crawl in a direct line. He would swerve backward and [45] forward as he was pulling himself along.

Q. The trail was irregular?

A. Oh, yes, the trail was irregular. He didn't go in a direct line.

Q. Did you observe anything else around the scene of the accident?

A. Naturally, having a lot of experience with accidents you look around to see what should be taken care of and what shouldn't. I found on the track what appeared to me to be a time book and another bunch of papers or writing of some kind. I imagine it was records of his labor or such as that. I picked those up and laid them on the motorcar.

Q. Anything else?

A. Well, I was trying to ascertain, if possible, what caused the accident.

Q. I see.

A. I found laying alongside the north rail what I took to be a grade stake.

Q. A grade stake? A. Yes, sir.

(Testimony of Dick Hallmark.)

Q. Can you tell us approximately what it looked like?

A. It is a square stake, one end is sharpened. It is about an inch and a quarter by an inch and a quarter and they vary in length. I don't recall the exact length of this one; I imagine it was around fifteen, between fifteen and eighteen inches in length. And along the rail I noticed some splinters [46] and from the end of this grade stake, as I termed it, it looked like it had been burred or hit on the end by a hammer.

Q. The grade stake was damaged in that way?

A. On the sharpened end it seemed as though it was burred, been hit by a hammer and the splinters were strewn along, I believe, oh, three or four ties, just small splinters.

The Court: Tell us just where you found it.

A. I found it south of the north rail.

The Court: Where with reference to where the car left the track?

A. That was within about four ties of where the car left the rail.

The Court: Where it jumped the track?

A. Yes, sir. It was up the track about three or four crossties, as best I recall.

Q. Were there any markings on it like grade stakes usually have, surveyors' markings?

A. No, sir, it hadn't been marked.

Q. Was it bright wood?

(Testimony of Dick Hallmark.)

A. Looked like oil, where it had lain on the track somewhere. It had oil on it.

Q. (By Mr. Gillen): Now, I want to see if I can clarify a point. Now, in answer to a question asked by His Honor, you said three or four ties from where it had left the track. You mean by that from where it had completely left the track or [47] first left the track?

A. No, where the first wheels left the track. You might say the first tie that had the imprint of the flange, just north of the south rail, the grade stake was lying in that proximity, just a very short distance.

Q. In other words, the first three or four ties that showed the indentation were imprint of the flange of the wheel of approximately the seventy-three ties you observed with the imprint on them?

A. That is right. And that also showed the small splinters just south of the north rail and this grade stake was lying just south of the north rail.

Q. Was that an unpainted or painted grade stake? A. Unpainted.

Q. And you answered His Honor it had some evidence of oil on it? A. Yes.

Q. Did it have any evidence of anything of a corrosive nature on it? Withdraw that. Did you disturb that grade stake at that time?

A. No, sir. I just called Mr. Singleton's attention to it and remarked, I said, "That is what threw it off the track." He said, "Yes, possibly."

(Testimony of Dick Hallmark.)

Q. Did you observe anything else around there or did you do anything with anything else around there at that time? [48]

A. I picked up some tools, wrenches, oil cans, a water bag, you know, just something——

Q. Where did you place those things?

A. I placed them back on the motorcar.

Q. Back on the motorcar?

A. Back on the motorcar.

Q. But you did not disturb the grade stake?

A. No, sir.

Q. What did you do after that, Mr. Hallmark?

A. I went to the S. P. Depot in Willcox; from there went back over the——

Q. Did you—I beg your pardon.

A. I went from the scene of the accident back to the S. P. Depot to report the accident.

Q. Did you encounter anybody there?

A. I did.

Q. Who was it you encountered there?

A. I forget the gentleman's name at this time, there has been so many of them. I can't recall his name, but at that time as I understand it, he was kind of in charge of these Maintenance Men, or something.

Q. Of what?

A. I believe his name was Ward.

Q. Mr. Ward?

A. I believe it was. I wouldn't be positive. [49]

Q. Did Mr. Ward do anything with you at that time?

(Testimony of Dick Hallmark.)

A. He and I went out to the scene of the accident.

Q. Did Mr. Singleton accompany you two?

A. Yes, sir.

Q. So Mr. Ward of the Southern Pacific Company, you and Mr. Singleton returned to the scene of the accident, is that correct? A. Yes, sir.

Q. Now, what did you do when you got out there with Mr. Ward?

A. He looked over the ground himself and we discussed distance, markings. I called his attention to this grade stake; I said, "Don't you believe that caused the accident?"

Q. Mr. Hallmark, we are not supposed to give hearsay testimony. Did you do anything with relation to turning the grade stake over to Mr. Ward?

A. Yes, sir, he picked it up.

Q. He did what?

A. He piked the grade stake up.

Q. Did you cover fairly what you did then at the scene of the accident with Mr. Ward or was there anything else you did?

A. Well, we didn't tarry very long because he said he wanted to get back and have the car brought in, it was too dangerous to remain out.

Q. Did you get Mr. Ward back to the Willcox depot? A. Yes, sir. [50]

Q. At some subsequent time were you shown any photographs of a motorcar? A. Yes, sir.

Q. By whom were you shown the photographs?

(Testimony of Dick Hallmark.)

A. He was a representative of the S. P. Company.

Q. Where were you shown the photographs?

A. I don't remember the exact place; I believe it was in the S. P. Depot.

Q. At Willcox? A. At Willcox.

Q. Were you shown the photographs with relation to any inquiries made of you or any statement being taken from you?

A. I gave them a statement.

Q. Were you shown the photographs the same time you gave them the statement?

A. No, sir, I was shown the photographs later.

Q. You were shown the photographs later?

A. Yes, sir.

Q. You were requested to give a statement, is that correct? A. That is right.

Q. And do you know the man by whom you were requested to give the statement, the Southern Pacific representative?

A. No. I had never seen the man before.

Q. Can you fix the time with relation to the accident?

A. It was the next day, I think. [51]

Q. The next day?

A. I believe it was the day following the accident. It wasn't more than two days.

Q. It was either the next day or two days following the accident?

A. Yes, sir, the best I recall. As best I recall I think it was the first day.

(Testimony of Dick Hallmark.)

Q. In what manner was the statement taken from you?

A. Well, we went into the S. P. Depot and he wrote down the statement as I made it.

Q. Did he read you back what he wrote down or permit you to read what he wrote down?

A. He read it back to me.

Q. Was there any portion of the statement you disputed at that time? A. There was.

Q. And did you do anything with regard to disputing the statement?

A. Yes, tore it up and threw it in the waste-basket.

Q. Why did you dispute the statement?

A. I told him if he couldn't put the statement down as I worded it to forget it.

Q. What particular part of the statement did you dispute?

Mr. Thompson: I object to that on the ground it is incompetent, irrelevant and immaterial. We don't see any point [52] to it at this stage of the case.

Mr. Gillen: Perhaps that is correct, Mr. Thompson. Perhaps that is anticipating; very well.

Q. Mr. Hallmark, when you observed the marks on the ties on the three times you inspected the scene there, were you able to determine the exact course the car had followed from the time it had left the track? Do you understand my question?

A. Yes. It proceeded in an eastward direction up the track, continued on east up the track.

(Testimony of Dick Hallmark.)

Q. Was there any indication by the markings or anything that the car had ever turned around?

A. No, sir, the car did not turn around.

Q. Which way was the car headed when you saw it?

A. I figured the car was headed ahead. But now I don't know enough about these cars—they will run either way—now, if you can tell me which end of the car the pulley is on that drives it I can tell you which way the car was headed.

Q. I think counsel would be willing to stipulate the driving power or pulley is at the rear.

Mr. Thompson: The witness can say where the pulley was.

The Court: All right, put it in that way, where the pulley was.

A. The pulley was on the rear axle. I say the rear axle, it was on the west end of the car.

Q. Was that west end of the car nearest the place where the [53] car left the rails?

A. Yes, sir.

Q. So that the car was headed in the direction it had come off the rails and proceeded over the ties, over the ground.

Mr. Thompson: If your Honor, please, that is leading, suggestive. I don't see that that is proper.

Mr. Gillen: I don't think that is leading and suggestive at all.

The Court: It isn't important either. Go on and tell your idea about the car, where the pulley was.

(Testimony of Dick Hallmark.)

A. Well, Judge, Your Honor——

The Court: Talk to the Jury.

The Witness: I looked at the car when I first went over there and I ascertained that the pulley or the belt was running from the motor back to the rear end of the car, as I termed it, and when I went back on the second trip—but the reason I noticed that the first trip was to see if I could ascertain anything that had gone wrong with the motor or if anything had dropped loose about the motor to cause the wreck and I also checked the tension on the belt, reached down through the car and checked the tension on the belt. Sometimes a belt can come loose and cause accidents.

The Court: You might state again whether the pulley was on the west end or east end.

A. Yes, sir, the pulley was on the west end. [54]

The Court: You thought that was the rear end?

A. I surmised that was the rear end and in my opinion it was. It satisfied my curiosity—well, I won't make that remark because it was stopped.

Q. Where the car had left a trail that you have described or a marking over the ties to where it came to rest, that was where the pulley was on the rear axle?

A. Yes. The car did not turn on the track, because it is a straight line or marking on the ties to the point where the right wheels hit the bolt on the outside of the north rail, which jumped the right

(Testimony of Dick Hallmark.)

wheels over the rail entirely, putting the car completely off the track. Then it proceeded up the track and came to rest about ten or fifteen, maybe twenty feet after it had completely left the rail.

Q. Is it your testimony it proceeded on the ground parallel to the track?

A. Yes, sir. Of course, it was veering from the track a little as it went.

Q. Veering away from the track? A. Yes.

Q. How many days, if you can tell us, approximately, after the accident was it you were shown photographs of a handcar or motorcar, rather?

A. Oh, I don't think it could have been more than four or five days at the outside. [55]

Q. Was it the same gentleman who had taken your statement?

A. No, sir, it was another gentleman. And I took him out to photograph the tracks. That is how I came to know the man, he wanted to know the exact spot.

Q. He had camera equipment with him?

A. Yes, sir, he had a camera with him.

Q. You took him back to point out the scene of the accident? A. Yes, sir.

Q. That was four or five days after the accident you said?

A. It was three or four days after the accident, I don't recall, but it followed pretty closely.

Q. Did you ever see those photographs again to your knowledge since the time they were shown to

(Testimony of Dick Hallmark.)

you by a photographer for the Southern Pacific Company whom you took out to get the pictures?

A. I haven't seen them since that time.

Q. Do you believe you would be able to recognize those photographs if you were shown them?

A. I believe I would. Photographs can be very deceiving.

Q. Do you recall what sort of pictures they were of the motorcar from the photographs?

A. It was taken from the bottom of the car.

Q. What is it?

A. It was taken of the bottom of the car.

Q. Of the bottom? [56]

A. Evidently the car had been stood up on end, partially on end—I don't know how that was arranged—but it is a photograph of the bottom of the car.

Q. To show the underpinning?

A. The under side of the car, yes, sir.

Mr. Gillen: I wonder if counsel would have any objection to letting us exhibit to this witness their photographs.

(Photographs handed to counsel.)

Mr. Gillen: Thank you. I would like to offer an objection for the record, Your Honor. I was wondering if it might be well to present my objection.

The Court: You can do it when we adjourn, as of now. When we adjourn at 4:00 o'clock, as of now.

(Testimony of Dick Hallmark.)

Mr. Gillen: I am afraid the effect of the objection would be destroyed then, Your Honor.

The Court: Not when I am saving it.

Mr. Gillen: May I respectfully, for the record, show I think the objection should be presented now. I will, of course, defer to the Court's ruling.

The Court: Yes, Mr. Gillen, you stated that.

Q. (By Mr. Gillen): I think I had just asked you, Marshal Hallmark, about some photographs you stated you were shown by the photographer representing the Southern Pacific Company either four or five days, you stated, after the accident and just before you took that photographer out to the scene of the [57] accident for the purpose of pointing out the scene to him for reasons he wanted to make some photographs there, is that correct?

A. Yes, sir.

Q. I show you here what appears to be eight photographs and ask you if you recognize any of those photographs as being either the photographs or similar to the photographs that you saw.

The Court: You have looked them over in the intermission, haven't you?

The Witness: Yes, sir. There are three here, even though they are enlargements now, at the time they were small, there are three here I recognize as the facsimile of the original photographs.

Q. (By Mr. Gillen): I wonder if you would pull those three you recognize out and hand them to the gentleman.

(Testimony of Dick Hallmark.)

A. That one, that one (indicating). Now, I could have possibly seen these too, which I did not pay them any mind, just those three I paid any particular attention to.

Q. Now, one of these photographs appears to be a motorcar turned completely over; the other over at an angle and the third of a motorcar tilted up, held up by a prop or brace. Those are the three, is that correct?

A. Yes, sir.

Mr. Gillen: I wonder if we might have these marked for [58] identification, please.

The Court: Are you going to make them your exhibits, Mr. Gillen?

Mr. Gillen: I am not certain at this time.

The Court: You had better give them your numbers, gentlemen. You are going to use them?

Mr. Thompson: I think we will.

The Court: All right, mark them.

(Plaintiff's Exhibits 1, 2 and 3 marked for identification.)

Q. (By Mr. Gillen): Now, was there any particular thing with relation to the bottom or under part of the motorcar that appears in those photographs you have shown, at least in two of the photographs, that was brought to your attention by anyone or that you observed without the matter being brought to your attention by someone?

A. Well—

Mr. Thompson: I think the answer should be yes or no.

RICHARD R. SINGLETON

called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you state your full name? [61]

A. Richard R. Singleton.

Q. I wonder if you will try to raise your voice so it may be heard by all the jurors as well as counsel on the other side of the table and the Court. Richard Singleton?

A. Right.

Q. Where do you reside?

A. Willcox, Arizona.

Q. What is your business, please?

A. Right now it is mining.

Q. Mining? A. Yes, sir.

Q. You have been a resident of Willcox for some time?

A. The past six years.

Q. How long have you been a resident of Arizona?

A. About twenty-three years now.

Q. Now, are you acquainted with Marshal Hallmark, the City Marshal of Willcox?

A. Yes, sir.

Q. Known him for some time have you?

A. Well, the time I have been in Willcox.

Q. Directing your attention to August 29, 1946, I will identify that as a day when matters pertaining to an accident came to your attention; I will ask you if you recall accompanying the City Marshal to any place from a street corner in Willcox? [62]

(Testimony of Richard R. Singleton.)

A. Yes, sir.

Q. Under what circumstances did you accompany him?

A. This accident had happened and was reported in and he asked me to go along with him.

Q. You rode out with him in his automobile, did you?

A. Yes, sir.

Q. Did anybody else go out to the scene?

A. Not at that moment.

Q. Did anybody precede you to the scene?

A. Not that I recall. We were the first ones to the accident.

Q. Did anybody who called the accident to your attention or reported it go with you to the scene?

A. No, sir.

Q. Do you remember a man and woman, tourist, calling it to your attention?

A. Yes, sir.

Q. Do you recall whether or not they showed you where the injured man was?

A. I don't recall they went back out with us. They told us about where the man was lying and how to find him.

Q. All right. Arriving at the scene where the man was what did you observe, will you relate to the Jury?

A. Arriving at the scene of the accident we found this man lying just about even with the bar pit on the right-hand side [63] of the road seemingly in a very serious condition.

(Testimony of Richard R. Singleton.)

Q. When you say seemingly in a very serious condition, will you tell us what you saw about him from which you drew that inference?

A. First we noticed his head was in bad shape, seemingly there was blood from front to back.

Q. Blood in front and back.

A. And crossways. As I walked up to him his head was about the first thing I noticed. Then I made a casual examination to see if he had any broken bones, which I observed he possibly had one broken ankle. We didn't dare touch him. I didn't dare put my hands on him until the doctor or ambulance could get there to take him to a doctor. I didn't feel it was my place to administer first aid, anything of that kind, until we had someone there.

Q. Did you notice anybody putting anything under his head?

A. I tried to put some grass to ease the tension on his neck. His head was lying on a lower bank.

Q. After you arrived there what, if anything, was done about summoning further aid?

A. The ambulance was summoned.

Q. Do you know who was sent for the ambulance?

A. No, I don't offhand. The ambulance arrived there shortly.

Q. While you were waiting for the ambulance did Marshal [64] Hallmark remain with you or leave you for any brief period?

A. He left me for a period of time to go over to the tracks to see what happened.

(Testimony of Richard R. Singleton.)

Q. I see. Did the Marshal return?

A. He returned, yes.

Q. The ambulance arrived?

A. The ambulance arrived.

Q. Was the injured man put in the ambulance?

A. The injured man was put in the ambulance.

Q. Do you know who that injured man was?

A. I learned his name later, which was Mr. Schnee.

Q. Do you see him in the courtroom?

A. I believe he is sitting opposite you there in the courtroom.

Q. The young man with the glasses on?

A. Yes, sir.

Q. Had you known him before that time?

A. No, sir, I hadn't.

Q. After the young man was sent away in the ambulance what, if anything, did you do and with whom?

A. Mr. Hallmark and I went back over to the tracks then to find out what it was that happened, to see if everything was in the clear.

Q. What did you observe?

A. We observed this small motorcar off of the tracks and [65] evidently we found——

The Court: I wish Number 6 juror would hold his hand up. Now, that is the man you have to talk to, Mr. Singleton. He isn't hearing a thing you are saying.

The Witness: Thank you, sir. As we approached

(Testimony of Richard R. Singleton.)

the track we found the car sitting off the left-hand side or north side of the track and we examined and found out where Mr. Schnee had been thrown off and hit the opposite track, which would be the south track and then in our observation we found where the car had hit something and jumped the track, followed its course and saw everything was in the clear; then Mr. Hallmark and I went back in to town.

Q. Did you observe any articles lying around or near the scene?

A. We observed some articles, yes, sir.

Q. Will you tell us what those articles were?

A. There were some wrenches and a notebook, apparently a time book, which we, I think, took that over to see they were in the proper place until the proper authorities got out there.

Q. Did you observe anything else near the scene?

A. We observed between the tracks a small piece of iron, a brake shoe, something to that effect, but couldn't observe that had anything to do with throwing the car.

Q. That would be your conclusion. Now, did you observe [66] anything else at or about the scene?

A. We found, upon investigation we found a stick.

Q. What kind of a stick, made out of what kind of material?

A. I believe it was a white pine stake.

The Court: You think it was pine, do you?

(Testimony of Richard R. Singleton.)

A. I believe it was a pine stake, yes, sir.

Q. (By Mr. Gillen): Pine stake?

The Court: Pine timber, white pine.

Q. (By Mr. Gillen): When you say white, you don't mean painted.

The Court: He means that species of white pine, isn't it?

The Witness: Yes, sir.

Q. (By Mr. Gillen): Did you notice anything about that stick?

A. We found the stick had been splintered, oh, for a space of probably a few feet where the stake had apparently hit something. The splinters were laying along back; then we later found where it had hit and the trail of splinters ended at the stake, I believe, that we found.

Q. All right. Keep your voice up, please. You say you and the Marshal then went in to town?

A. Yes, sir.

Q. Do you recall where you went?

A. I believe we went around by the depot or around by the doctor's office to see if everything was taken care of. [67]

Q. Did you return to the scene of the accident?

A. We later returned to the scene of the accident with Mr. Ward, I believe.

Q. Who is Mr. Ward, if you know?

A. As to his capacity there at the time, I don't recall.

Q. By whom was he employed, if you know?

(Testimony of Richard R. Singleton.)

A. The S. P. Railroad.

Q. The Southern Pacific Railroad. Now, did you go out to the motorcar?

A. We went out to the motorcar at the scene of the accident.

Q. Did you observe what, if anything, was done with the white pine—as you distinguished it—grader's stake or surveyor's stake?

The Court: Did you call it a grade stake?

The Witness: I believe it was a grade stake.

The Court: All right.

The Witness: Having been familiar with some of those.

The Court: All right. He wants to know what was done with it.

A. If I remember correctly, the stake was taken back up to the motorcar and laid on the car.

Q. By whom?

A. Either Mr. Hallmark or Mr. Ward at the time, I don't recall.

Q. Then you left the scene of the accident with Mr. Hallmark [68] and Mr. Ward?

A. Yes, sir.

Q. Now, did any representative of the Southern Pacific Railroad interview you at any later time?

A. Yes, sir, I believe they did.

Q. About how long after the accident or after the 29th of August, 1946?

Mr. Thompson: I object to that, if the Court please, on the ground it is incompetent, immaterial and irrelevant.

(Testimony of Richard R. Singleton.)

The Court: He may answer. He asked how long it was.

A. That I don't recall just how long it was afterwards.

Q. (By Mr. Gillen): Can you give us any estimate? Was it a matter of days, weeks or months?

A. I believe it was only a matter of a few days, something like that.

Q. A few days, something like that, is that your answer? A. Yes, sir.

Q. Were you ever shown any photographs of a motorcar by any representative of the Southern Pacific Company?

A. I have seen photographs, yes.

Q. When?

A. I believe only a few days ago.

Q. A few days ago? A. Yes, sir.

Q. By whom were you shown the photographs? [69]

A. I believe Mr. Thompson.

Q. Mr. Thompson, the attorney for the Southern Pacific Company that is sitting here?

A. Yes, sir.

Q. Where was that, please?

A. In Mr. Thompson's office.

Q. Here in Tucson, Arizona? A. Yes, sir.

Mr. Gillen: May I have the photographs that were marked for identification, I wish to pass them to the witness. I wonder if the Clerk might pass those photographs to the witness.

(Testimony of Richard R. Singleton.)

Q. I ask you to look at those photographs, Mr. Singleton, and tell us whether or not those are the photographs or similar to the photographs shown you by Mr. Thompson just a few days ago at his office in Tucson, Arizona.

A. From examination I would say they were.

Q. Was there any part or portion of those photographs that was called to your attention?

Mr. Thompson: I object to that on the ground it is incompetent, irrelevant and immaterial as to what was called to his attention. The photographs will speak for themselves.

The Court: He may answer. Called to his attention by whom?

Mr. Gillen: By anyone. [70]

The Court: Well, it will have to be specific.

Mr. Gillen: Very well, I will withdraw the question. Did Mr. Thompson in exhibiting those photographs to you, if I understand you correctly, did Mr. Thompson indicate you pay particular notice or observe any particular thing in any of those photographs?

Mr. Thompson: I object to that on the ground it is certainly incompetent to prove or disprove any issue in this case.

The Court: He may answer.

A. The mark of where the stick struck the car.

Q. Is that what Mr. Thompson said? I don't think the answer was quite responsive to the question, Your Honor. It was either what Mr. Thomp-

(Testimony of Richard R. Singleton.)

son said or this gentleman's conclusion. I wonder if I might ask the original question be reread to him?

The Court: Start over again.

Q. (By Mr. Gillen): Mr. Singleton, my question is, when you were exhibited or when those photographs were exhibited to you by Mr. Thompson at Mr. Thompson's office did he ask you to note or did he direct you to note any particular part on any of those photographs? Will you just answer that yes or no? A. Yes.

Q. How did he do it, by pointing out something to you?

A. Pointing out the position of where the stake, the splinters were on the car. [71]

Q. Where the splinters were on the car and what part of the car, please? A. Yes, sir.

Q. What part of the car, please?

A. On the under side of the car near the, I would say the brake rod.

Mr. Gillen: I see. I think that is all of this witness. Counsel may cross-examine.

Cross-Examination

By Mr. Thompson:

Q. Mr. Singleton, you mentioned a brake shoe, I believe you said, or something you saw there that day at the scene of the accident. Am I correct in that? A. Yes, sir.

Q. And with reference to where the motorcar

(Testimony of Richard R. Singleton.)

was standing where was that piece of brake shoe?

A. I don't know in footage just about how far, but it was to the east of the car.

Q. And was it inside the rails or outside the rails? A. No, sir, inside the rails.

Q. But to the east of—

A. To the west of the car, I beg your pardon.

Q. To the west of the car and how far west of the car?

A. Well, that in footage I couldn't say.

Q. Approximately how far with reference to the car? Where [72] was it with reference to this stake you told about, or stick?

A. I believe the stake was still to the west, or the piece of iron we found.

Q. Did you observe the piece of iron closely?

A. Yes, sir.

Q. Did it give any evidence of having been moved recently?

A. No evidence it had been moved at all.

Q. Did it have the appearance of having been at the same point for quite some time? A. Yes.

Mr. Gillen: Of course I would have to offer the objection that would be calling for an opinion and conclusion.

The Court: He may answer.

(Last question read.)

The Court: What are you talking about now there?

(Testimony of Richard R. Singleton.)

The Witness: The piece of iron.

Q. (By Mr. Thompson): I believe in your direct testimony you said you found something about where something had struck the ties or ground, did you not? A. Yes, sir.

Q. What was it you found that indicated that anything had struck the ties or ground, Mr. Singleton?

A. We found a fresh abrasion on the side of the tie.

Q. Now, let me go back. Did you make any observations there to find out whether or not there were any wheel marks on the [73] ties of any character? A. We did.

Q. What was it you were trying to determine, where the car jumped the track? A. Yes, sir.

Q. With reference to where you found those wheel marks where did you find that abrasion, as you call it, on the tie?

A. Apparently very near where the wheel marks started on the tie.

Q. And were they west or east of the wheel marks where they started on the ties, if you recall it.

A. Slightly west of it.

Q. Did you at that time look under the motorcar that day while you were out there?

A. I did.

Q. Did you see any evidence of anything striking the motorcar underneath the motorcar at that point?

A. I did.

(Testimony of Richard R. Singleton.)

Q. What did you see that was unusual?

A. I saw that evidently some stake or instrument of some kind had hit the underside of this car. The marks were fresh.

Q. You say you saw that. What did you see? Tell the Jury just what it was you saw there.

A. What I saw on the underside of the car was where something had struck it apparently and had lifted the car, leaving [74] splinters or an abrasion or a scarred place on the underside of the car.

Q. Could you tell what type splinters they were, Mr. Singleton, what type wood was it?

A. I don't think I could from what was on the car there because that seemed to come from the flooring under the car.

Q. I beg your pardon.

A. That seemed to be on the flooring of the car. I didn't lift the car up to examine it thoroughly, I just looked underneath it as it was sitting there beside the track.

Q. And saw where something had struck underneath the car?

A. Saw where it had been struck.

Q. Do you recall at this time where that abrasion was you mentioned on the ties with respect to the two rails, where it appeared?

A. It was slightly to the north side, to the left-hand side of the track looking east.

Q. To the left-hand side of the track going east, is that right? A. Yes, sir.

(Testimony of Richard R. Singleton.)

Q. With respect to the center line between the tracks where would that abrasion have been, Mr. Singleton?

A. It would have been slightly to the left.

Q. To the left of the center?

A. Yes, sir, toward the north. [75]

Q. I don't know that I recall what you said about the condition of this stick or stake, Mr. Singleton. What was its condition?

A. The stake showed evidence of having hit something. One end of it was sheared or nubbed off and splinters were thrown from it for a matter of a few feet there.

Q. What was the condition of the other end?

A. The other end of it, as I recall, was slightly splintered up; not as bad as the other end.

Q. Both ends showed evidence of having struck something?

A. Of having struck something.

Mr. Thompson: I believe that is all, Your Honor.

Mr. Gillen: I think no further questions at this time. I have no further witnesses available on the matter of the liability at this time. I have another witness on that subject, but not available and not reachable at this time, if it please the Court.

The Court: Well, I just can't work jagged hours like this. I will decide later whether I will let you put him on. I want you to proceed now as to liability. This is the plaintiff's case as to liability. If you want to make any motion you can make it at adjournment as of now.

Mr. Gillen: May I be heard by the Court on a motion I mentioned before?

The Court: Oh, yes, at adjournment, as of the time you [76] mentioned it.

Mr. Gillen: I would like the record, of course, Your Honor, speaking about jagged hours, I would like the Jury to know that Your Honor's ruling came as a complete surprise to me. I had my case lined out a certain way.

The Court: I don't want to criticize you or prejudice you at all before the Jury. I am just saying we want to make good out of our time.

Mr. Thompson: Call Mr. Young.

Mr. Gillen: May I respectfully offer the objection to the defendant's case opening before the plaintiff's case is closed on the particular issue involved and before the Court hears an objection and the reasons of the objection to be offered in connection with the procedure Your Honor has ordered.

The Court: The Reporter is taking your objection.

Mr. Gillen: Yes, sir.

ALEXANDER J. YOUNG

called as a witness on behalf of the defendant, being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. Please state your name.

A. Alexander J. Young.

(Testimony of Alexander J. Young.)

Q. Where do you reside? [77]

A. 1392 Waverly Street, Tucson, Arizona.

Q. By whom are you employed?

A. Southern Pacific Company.

Q. How long have you been employed by the Southern Pacific Company?

A. Thirty-three years last May 15th.

Q. What is your present position with the railroad company? A. Signal Maintainer.

Q. How long have you been employed as Signal Maintainer?

A. Since May 15, 1916.

Q. In August and July, 1946, were you stationed at Tucson? A. Yes.

Q. Are you acquainted with the plaintiff, Adolph J. Schnee? A. Yes.

Q. When did you become acquainted with him, Mr. Young?

A. I couldn't say exactly when he started to work for me, but I have no record as to when that was.

Q. When he started to work for the Company he was working with you, is that correct?

A. Yes, he started to work with me.

Q. In what capacity did he start to work?

A. Assistant Signalman.

Q. Did you have any occasion to work with him and give him certain instructions with respect to signal maintenance?

A. Yes, he worked with me. [78]

Q. Did you have any occasion to instruct him

(Testimony of Alexander J. Young.)

with respect to how to build batteries and keep them in repair, signal batteries? Also, did you give him any instructions as to the operation of motor-cars? A. Yes.

Q. How long did he work with you?

A. I don't know, it was several months, but I don't know exactly how long.

Q. Did you give him any instructions with respect to the safety rules of the Company so far as they applied to his job and your job? A. Yes.

Q. And he worked there with you, you say, for some time? A. Yes, some months.

Q. Did he ever in your presence or with you operate one of the motorcars such as used out in your occupation?

A. Along toward the last before he was sent out he did, with me.

Q. You instructed him with respect to that?

Mr. Gillen: Just a moment. I am going to have to offer the objection that counsel's entire examination has been most leading thus far. In fact, he has practically testified.

Q. (By Mr. Thompson): Mr. Young, tell the Jury what you did with respect to the plaintiff in connection with his employment while he was working with you; just tell them as nearly [79] as you can what your duties were with respect to the plaintiff.

A. Well, my work consists of various things like oil signals, building batteries, pulling track support resister wires; there were lots of things. He was

(Testimony of Alexander J. Young.)

with me during all this time and watched me do these things and helped me do these things.

Q. I will ask you whether or not in your work you do operate motorcars. A. Yes.

Q. Tell the Jury what he did with respect to you and him when you were working there during that period with respect to motorcars.

Mr. Gillen: I object to that as having been asked and answered.

The Court: Overruled.

Q. (By Mr. Thompson): Will you tell us, please?

A. When we go out on our work we use the motorcar to travel from one place to the other. I have a district, say, twenty-three or twenty-four miles; we travel from one point to another on the motorcar. He would go with me, I operated the motorcar, but he was with me until a short time before he knew he was going to be sent out; but I am sure I let him operate the motorcar; and when he was along let him handle the controls and handle the motorcar. [80]

Q. Did you have anything to do with instructing the plaintiff so far as safety rules were concerned in operating motorcars?

A. Yes, I did tell him the safe operation of motorcars.

Q. Did you ever give him any safety instructions at what speed motorcars should be operated?

A. Yes; and I always tried to operate the motorcar at a safe speed.

(Testimony of Alexander J. Young.)

Mr. Gillen: I move the latter be stricken.

The Court: It may be stricken. Disregard it.

Q. (By Mr. Thompson): Did you give any instructions to the plaintiff? A. Yes.

Q. What were your instructions to him in regard to permissible speeds?

Mr. Gillen: I wonder if we might fix the time and place.

Q. Do you remember the particular time when you told him that? A. Yes.

Q. Are you sure you did it sometime during the period? A. Yes.

Q. While you and he were together; do you recall anyone else was present? A. No.

Q. What did you tell him with respect to the speed rules [81] governing the speed of those motorcars?

A. The speed is twenty-five miles an hour on straight track and five miles an hour on street and road crossings, but we have to use a little judgment in going on street crossings; where there is lots of traffic you can't even do that.

Mr. Gillen: I ask it all be stricken as not responsive.

The Court: That is all right. It may stand.

Q. Just one more question, Mr. Young. Did you ever give him any instructions with respect to the operating of the motorcar in a back up position?

A. Well——

Q. Just answer yes or no. A. Yes.

(Testimony of Alexander J. Young.)

Q. What did you tell him, if you recall?

A. I told him it wasn't a safe practice to operate the motorcar in reverse position except at short distances, then at reduced speed.

Mr. Thompson: That is all.

Mr. Gillen: I move that be stricken as incompetent, irrelevant and immaterial.

The Court: Denied. Cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Young, how long was Mr. Schnee, the plaintiff, employed with you? [82]

A. I couldn't say. I have no record.

Q. You said a matter of several months?

A. Yes.

Q. Can you tell us what you mean by several months?

A. No, I can't because I can't remember. He was with me several months and I can't remember how many.

Q. Was it four, five or six months?

A. I couldn't say, I don't know.

Q. You said several months. Do you mean by that more than three months.

A. I know he was with me more than two months.

Q. More than two months?

A. More than two months, yes.

Q. You have a distinct recollection, do you, of

(Testimony of Alexander J. Young.)

instructing him in the use and operation of the motorcar, is that correct? A. Yes.

Q. Do you have a distinct recollection of ever having him operate the motorcar when he was with you? A. Yes.

Q. How many times? A. I couldn't say.

Q. Twenty, thirty, forty times?

A. I couldn't say for sure.

Q. Can you give us any idea? A. No. [83]

Q. Just once?

A. No, several times. Several times, I don't know how many.

Q. Do you use the term several in its common meaning of more than three times? A. Yes.

Q. More than three times? A. Yes.

Q. Would you say it was ten times?

A. I couldn't say. I don't know. I don't remember.

Q. Did you operate the motorcar every day for the period of a month or two months that this plaintiff worked with you as an assistant or helper?

A. I did until after I let him operate by himself.

Q. At what point in his association with you in the work did you permit him to operate the car by himself? A. I don't remember that.

Q. Sir? A. I don't remember.

Q. Do you remember how long it was before this accident you permitted him to operate the car?

A. It was probably a week or more.

A. A week or more? A. Yes.

(Testimony of Alexander J. Young.)

Q. Was it a week or more than a week?

A. I couldn't say. [84]

Q. Was it a week?

A. I don't know. It was more than a week, yes.

Q. How much more than a week?

A. I don't know.

Q. Do you have any idea? A. No.

Q. Was it a month? A. No.

Q. Was it less than two weeks?

A. I couldn't tell you. I don't remember.

Q. Who else was working on that maintenance work there? A. With me?

Q. Over that same course.

A. No one else—with me, you mean?

Q. Yes.

A. No one but Mr. Schnee.

Q. Who else was working over that same course maintaining signals?

A. I don't understand what you mean.

Q. What other signal maintainers were there working over that same area?

A. I was assigned to the section; no one else was working there but me.

Q. Did you know a man named Joe that worked as Signal Maintenance Man over that same area? [85]

A. Joe?

Q. Yes. A. No.

Q. Did you know a man named Curry Fields that worked as Maintenance Man over that same area?

(Testimony of Alexander J. Young.)

A. Yes.

Q. Where did he work and when?

A. He was a boy going to the University and he worked with me once in awhile on Saturdays.

Q. At the same time Mr. Schnee was working?

A. I couldn't say about that. I don't know. I don't remember, that is too far back.

Q. You have stated in your direct examination you remember specific things you told Mr. Schnee by way of instruction. Now, do you mean to say you don't remember now whether you had two apprentices working at the same time or not?

A. This other man was no apprentice, he was a Signalman. He was no apprentice.

Q. He was an assistant to you, wasn't he?

A. No, he was working with me, but he wasn't under me. I didn't keep his time. I didn't have anything really to do with him. He was working in my section under me. He was a Signalman.

Q. Were you mistaken when you said a moment ago no one worked your section besides Mr. Schnee? [86]

A. At that time I didn't remember.

Q. At that time you said another man——

A. I don't remember whether he worked with me. He worked under me, but I couldn't say whether he worked under me when Mr. Schnee worked with me.

Q. Isn't it true during the time Mr. Schnee worked with you, whatever length of time it was,

(Testimony of Alexander J. Young.)

you had him doing the exclusive work of cleaning up switches and you never permitted him to operate the motorcar and never gave him any instructions on the operation of the motorcar during the entire time he was with you?

(Question read.)

A. That is not true.

Q. When did you take your vacation in 1946?

A. I don't remember that either.

Q. Sir?

A. I don't remember. I have no recollection.

Q. Did you take it in July?

A. I am not sure.

Q. Did you take it in August?

A. I am not sure.

Q. Isn't it a fact that Mr. Curry Field worked for a period of two weeks in your place while you were on vacation in the year 1946?

A. Mr. Fields relieved me when I was gone, Mr. Curry—[87] Field Curry, I believe it is, relieved me, but he wasn't there when I came back. I don't remember who was.

Q. Is your answer he did take your place when you went on vacation?

A. He took my place, yes.

Q. And you were on vacation for two weeks?

A. Yes.

Mr. Gillen: I think that is all.

Mr. Thompson: That is all.

MARK O. WALLACE

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name. A. Mark O. Wallace.

Q. Where do you reside at present?

A. San Jose, California.

Q. Where were you residing in August, 1946?

A. At Tucson.

Q. Were you employed by the Southern Pacific at that time? A. Yes, sir.

Q. In what capacity?

A. Assistant Signal Supervisor.

Q. Where? [88]

A. Between about seven miles west of Tucson to about three miles west of Lordsburg.

Q. On the Tucson Division?

A. On the Tucson Division, yes, sir.

Q. You are employed by the Southern Pacific at the present time? A. No, sir.

Q. Are you retired? A. Yes, sir.

Q. Are you acquainted with the plaintiff, Mr. Schnee? A. Yes, sir.

Q. Were you acquainted with him in August, 1946? A. Yes, sir.

Q. Did you have an occasion to be in his company at any time during August, 1946?

A. I did.

(Testimony of Mark O. Wallace.)

Q. Just tell the Jury under what circumstances, where you met him and the reasons for your being in his company.

Mr. Gillen: Just a moment. I am going to offer the objection to that as being too general a question; invites self-serving statements and incompetent, irrelevant and immaterial matters.

Mr. Thompson: I will withdraw the question and ask another question. Q. What were your duties, if any, with respect to apprentices or students in the Signal Maintenance [89] Department, Mr. Wallace?

A. It was my duty to instruct him in safety rules in the operation of his motorcar and maintenance of signals and minor other duties that he may have to perform.

Q. Where did you see him in the month of August, 1946, speaking now of "him," meaning the plaintiff.

A. Here in Tucson; and I rode on the train with him out to Willcox.

Q. To Willcox, Arizona? A. Yes, sir.

Q. About when?

A. It was in August, 1946.

Q. And were you with him for any considerable length of time at Willcox, in August, 1946?

A. I was with him a part of the day the day we went out there and all of the next day and part of the third day.

Q. And what, if anything, were you and he doing during that period of time?

(Testimony of Mark O. Wallace.)

A. Well, we went out and built——

Mr. Gillen: I don't hear him.

A. ——built some batteries. Then I took him over the district to acquaint him with his territory and I instructed him on the operation of the motorcar and to—well, to be careful in all his duties, so see that he kept out of the way of trains and not run his car too fast, such things as that. [90]

Q. Was there a motorcar there for the use of the Signal Maintenance Man at Willcox?

A. Yes, sir.

Q. Was that car there when you and Mr. Schnee arrived at Willcox?

A. Yes, sir.

Q. Did you have occasion to see that car, that motorcar? A. I did.

Q. Occasion to ride on it or operate it?

A. I did.

Q. What was its condition at that time?

A. It was very good.

Mr. Gillen: Just a moment. We are going to move that answer be stricken. It is an opinion and a conclusion without any foundation being laid whether he made any examination of it or that he was capable of determining its condition.

The Court: Motion denied.

Q. (By Mr. Thompson): Now, with respect to coming back to the time you were in Tucson, Mr. Wallace, and before you and Mr. Schnee went to Willcox, did you have any occasion to instruct Mr.

(Testimony of Mark O. Wallace.)

Schnee with respect to the safety rules of the Company with regard to various matters?

A. Yes, sir.

Q. What matters did you instruct him with respect at that time? [91]

A. We covered approximately all the rules in the Maintenance of Way Book of Rules.

Q. Do you know whether or not he had any instruction on the operation of motorcars?

A. Previous to my——

Q. Going with him to Willcox, do you know?

A. We discussed different things on the way out there; I don't recall just what they were.

Q. Did he operate the motorcar at Willcox at any time while you were there?

A. Yes, sir.

Q. Did you operate the motorcar as well?

A. Very little.

Mr. Thompson: That is all.

Cross-Examination

By Mr. Gillen:

Q. Mr. Wallace, you are retired on a pension from the Southern Pacific Railroad Company, is that correct?

A. Yes, sir.

Q. You draw a pension now?

A. Draw an annuity. I don't believe they call it a pension.

Q. You draw money as the result of the number of years you were with the Company and the seniority you had attained?

A. Yes, sir.

(Testimony of Mark O. Wallace.)

Q. Retirement on a financial emolument of some kind? [92] A. That is right.

Q. You have a son still employed by the Southern Pacific Company, have you not?

A. Yes, I have two.

Q. Two sons employed by the Southern Pacific Company, is that correct? A. Yes, sir.

Q. Where are they employed?

A. San Jose.

Q. In what capacity?

A. One is a Motorcar Repairman and the other is a Signalman.

Q. And they have been with the Company for some years, have they?

A. Approximately fourteen years.

Q. At the time you first met the plaintiff, Mr. Schnee, and took him out to Willcox where was he working? A. Here in Tucson.

Q. Do you remember under what circumstances you transferred him to Willcox or he was transferred to Willcox?

A. Well, the previous Maintainer had been transferred to another position and there had been another man out there previous to Mr. Schnee relieving this man.

Q. Let me ask you if this doesn't refresh your recollection. One morning Mr. Schnee appeared for work at the yard in Tucson, Arizona and that you said to him, "Better go back home and get [93] some blankets and things, the Signal Maintenance

(Testimony of Mark O. Wallace.)

man out at Willecox has gotten drunk and laid off the job and I have to shove a man in there to fill the place." Does that refresh your recollection?

A. This was the relief man relieving the regular Maintenance man.

Q. That is right, isn't that so?

A. That is so.

Q. You had a kind of hurry up job about making a Signal Maintenance man out of him under those circumstances, is that correct? A. Well——

Q. Will you answer yes or no. If you wish to make any explanation I am sure the Court will permit you to. A. Yes.

Mr. Gillen: That is all.

Mr. Thompson: No questions.

The Court: At this time we will take our evening recess until 10:00 o'clock in the morning.

(Whereupon a recess was taken to Thursday, March 2nd, at 10:00 o'clock a.m.)

The following proceedings were had after the recess in the absence of the Jury.

The Court: State your motions gentlemen. Mr. Gillen first. [94]

Mr. Gillen: If it please the Court, I offer the objection to the Court proceeding in the manner that the Court indicated counsel should proceed and upon the ground that the procedure first of all does not here, as indicated for the reasons in Subdivision B, Rule 42 of the Rules of Civil Procedure,

does not either serve to convenience the Court, facilitate the matter or to avoid prejudice. On the other hand, the plaintiff feels that it does prejudice his case and his cause. I particularly wish to direct my objection to proceeding in the manner directed by the Court, to this particular point. If Your Honor will recall in his opening statement Mr. Henderson, one of the defense counsel, indicated to the Jury that reliance upon the affirmative defense set up in the defendant's pleadings to the effect and point that the accident in this case and the injuries resulting therefrom were due exclusively to the negligence of the plaintiff himself and not of the defendant in any part or wise, was based upon a statement allegedly made by the plaintiff within—as my notes indicate, Mr. Henderson—a very few days after the accident where a representative of the Company, according to the statement made, presumably took a statement from the plaintiff in which the plaintiff purportedly gave some facts or made some statement indicating his negligence; and that reliance is being placed upon that.

Now, may it please the Court, we feel that if the defendant in support of its affirmative defense is relying upon [95] a statement and admission against interest, so to speak, made by the plaintiff in this case then most certainly the Court and the Jury, the Court for the purposes of its rulings and the Jury for the purposes of sitting in adjudication of the facts, should have the full benefit of all evidence pertaining to the extent of the injuries and the physical condition of this plaintiff for the

period of time to determine whether or not this statement taken a very few days after the accident, according to the representation made by counsel, was obtained under circumstances and conditions where the plaintiff was in a position to even know whether he was talking to anybody or not. We feel that is part of the liability. We feel it has served no purpose. I say all this, of course, respectfully. It has thrown us completely off balance and off the beam, so to speak. I have in mind Your Honor's intention was to facilitate the matter for the benefit of everybody, both litigants, which is entirely proper. But I believe in so doing Your Honor has put the defendant at a decided disadvantage.

I desire that objection in the record and I feel I should have been afforded an opportunity to make the objection before the case got into a state of partial conclusion of the plaintiff's case and the beginning of the defendant's case. I want the record to note the plaintiff never submitted and rested its case on the particular issue of liability.

The Court: Objection overruled. As to the last point, [96] the one about the statement, I am confident we can take care of that if and when it arises. If you have another witness on liability, if you have him in at 10:00 o'clock I will hear him then.

Mr. Henderson: We would like to make a motion for a directed verdict as of the close of plaintiff's case on the ground the case does not fall within the federal rule that the evidence has to be more than a mere scintilla, has to be more than a

conjectural showing of negligence on the part of the defendant here. The specific motion is based on failure of proof and failure of any proof that will raise any reasonable inference on the part of this plaintiff which is sufficient to go to a Jury on the question of the defendant's negligence.

Mr. Justice Black said in the case decided in January of last year, 1949, which is apparently one of the last Federal Act cases, *Wilson vs. McCarty*, found in the Law Edition advance sheets, 93, at page 403, I believe the Federal Act in spite of the interpretation given it by the United States Supreme Court is still based on negligence; that after all is the only question in this case, everything else has been eliminated. There is still the fundamental proposition there must be negligence found, in the plaintiff's case there is nothing of any weight, as I say, anything that will even fulfill a scintilla and, of course, the Federal Courts do not follow the scintilla rule, except require some substantial evidence [97] on the part of the plaintiff for negligence.

I might present this motion in two parts. Of course, we do have the safety appliance part of the case and under any construction of the case there is no violation of the Safety Appliance Act, therefore I think our motion is well taken for dismissal of that portion of the act. The Safety Appliance Act applies to automatic couplers and grab irons, and so forth and there is no showing that the Interstate Commerce Commission has taken jurisdiction

over the motorear phase of the defendant's business. So far as the safety appliance part I feel the motion is well taken. I believe, as a matter of fact, in the pre-trial conference it was indicated by Mr. Gillen at some point in the case that attack might well be abandoned.

The Court: I will hear you again at the conclusion of all the testimony on the question of liability.

(Whereupon, the recess was taken until 10:00 o'clock a.m. the following day, March 2nd.)

The Court: You were about to call a witness.

Mr. Thompson: I understand the Court told plaintiff's counsel he might call a witness.

The Court: Yes.

Mr. Gillen: Upon taking inventory of the record I determined the witness I had in mind would perhaps be premature, so I won't call the witness at this time.

Mr. Thompson: We will call Mr. Ward. [98]

ROBERT W. WARD

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name for the record, please.

A. Robert W. Ward.

Q. Where do you presently reside, Mr. Ward?

(Testimnoy of Robert W. Ward.)

A. Yuma, Arizona.

Q. What is your present occupation?

A. Signal Maintainer.

Q. For what Company?

A. Southern Pacific Company.

Q. Where did you reside and by whom were you employed in August, 1946, Mr. Ward?

A. At Willcox, Arizona, employed by the Southern Pacific Company.

Q. Are you acquainted with the plaintiff, Mr. Schnee? A. I am, yes, sir.

Q. Do you recall an occasion when he came out to Willcox as relief Signal Maintainer?

A. I wasn't at Willcox at the time, no, sir.

Q. Were you at Willcox on the 29th of August, 1946? A. Yes, sir.

Q. Did anything of an unusual nature transpire on that day [99] so far as you were concerned?

A. Yes, sir.

Q. Did you recieve word there had been an accident? A. I did, yes, sir.

Q. Who communicated that fact to you?

A. The Southern Pacific Company Station Agent called me on the phone at my home.

Q. Did you know who had been involved in the accident? A. Not at that time, no, sir.

Q. Did you later in the day meet with Mr. Hallmark, an officer at Willcox? A. Yes, sir, I did.

Q. Did you go with him to what you understood to be the scene of the accident? A. Yes, sir.

Q. And where did you go?

A. Well, it was better than a mile and a half, less than two miles east of Willcox.

Q. On the track of the Southern Pacific or within its right-of-way?

A. We drove out in an automobile, yes, sir, and went out to the track through the field.

Q. This was on August 29; about what time of day was it, do you recall?

A. Somewhere between 2 and 3 p.m. [100]

Q. And when you went with Mr. Hallmark what, if anything, did you find along the right-of-way?

A. The wrecked motorcar sitting alongside the track.

Q. Had you ever seen that motorcar before?

A. Oh, yes, sir.

Q. And where had you seen it previously?

A. I had driven that same motorcar for several thousand miles.

Q. And was it the motorcar that was ordinarily used by the Signal Maintainer at Willcox?

A. That was the car assigned to that location, yes, sir.

Q. Was it on or off the tracks proper at the time you saw it? A. It was off of the tracks.

Q. And was it still on its wheels or in an upright position or overturned?

A. It was in an upright position sitting on all four wheels.

Q. About how far from the nearest rail would you say? A. About five feet.

(Testimnoy of Robert W. Ward.)

Q. And with reference to the rails which was it closer to, the north or south rail?

A. To the north rail.

Q. At that point then did you make any sort of investigation to find out what, if anything, had derailed the motorcar? A. I did, yes, sir. [101]

Q. What, if anything, did you find there at that place that was out of the ordinary?

Mr. Gillen: May I interrupt, Your Honor. I have subpoenaed the records through the custodian of the medical records at St. Mary's Hospital and I wonder would there be any objection if this witness could be called out of turn and the records identified?

The Court: All right, step down. Would you have any objection?

Mr. Thompson: No.

PATRICIA MAE JAMES

called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gillen:

Q. Please state your name.

A. Patricia Mae James.

Q. Where do you live?

A. 2925 East Nineteenth Street.

Q. Tucson, Arizona? A. Tucson, Arizona.

Q. What is your business?

(Testimony of Patricia Mae James.)

A. I am clerk of the record room at St. Mary's Hospital.

Q. In Tucson, is that correct?

A. Tucson. [102]

Q. As such clerk in the record room do you have access to and supervision of medical records and X-rays and data pertaining to patient's cases?

A. Yes, I do.

Q. Are you here this morning in response to a subpoena duces tecum to bring with you all records and data pertaining to the case of one Adolph J. Schnee who was a patient in your hospital in the latter part of 1946 and early part of 1947?

A. Yes.

Q. Did you bring those records with you?

A. Yes, I have them.

Q. Those records you have with you, are they to your knowledge all the records on file in your hospital library pertaining to that case?

A. Yes, they are.

Q. Will you pass them to the Clerk, please?

Mr. Gillen: I am a little bit confused on the procedure we are following; I would like those records to be offered as an exhibit on behalf of the plaintiff, in evidence.

The Court: They may be admitted.

(Plaintiff's Exhibit 4 in evidence.)

Mr. Gillen: Very well, counsel may cross-examine.

Mr. Thompson: No questions.

ROBERT W. WARD

recalled, having been previously sworn, testified as follows: [103]

(The last question was read.)

Mr. Gillen: Objected to as calling for a conclusion.

The Court: He may answer yes or no.

A. Yes, I did.

The Court: Now wait for the next question.

Q. (By Mr. Thompson): What, if anything, did you find at that point?

A. We found what is used by surveyors as a stake, for one thing; also found a U-shaped piece of iron that is used as a brake hanger, but evidently had no connection and was replaced exactly where it was found. It was slightly beyond the point beyond where the car had come to rest.

Q. Where did you find this stick or stake with reference to the motorcar?

A. The motorcar had left the track about sixty-three ties west of where it came to rest and we found the stake about four to six ties east of the point from where the motorcar first left the track.

Q. And this stick or stake, what was the nature of its appearance? Just describe it to the Jury the best you can.

A. It was an ordinary surveyor's stake; one end of it was shattered.

The Court: Do you have that here?

Mr. Thompson: No.

(Testimony of Robert W. Ward.)

The Court: What ever happened to it? [104]

Mr. Thompson: I don't know. It was lost.

The Witness: The pointed end which surveyors use to drive into the ground looked like it had been wedged into something and broken off. The stake also looked as though, gave all indications it had been used for stirring caustic soda solution.

Mr. Gillen: I move that be stricken out, his opinion and conclusion.

The Court: Motion denied.

Q. (By Mr. Thompson): About how long was this stick or stake at the time you saw it, what was left of it?

A. I would say twenty-four to twenty-seven inches.

Q. Did you find any splinters?

A. Yes, we did.

Q. Which direction from where the stake was, with reference to the motorcar?

A. They were—I don't believe I remember exactly where we found them. They were in the center of the track close by this stake. Whether they were slightly east or west I am not in a position to say.

Q. Do you recall whether or not you found any other thing that was of an unusual nature along the track at that point?

A. Unusual nature, no, sir.

Q. Did you pick up any other articles at all other than the stake? [105]

A. I picked up several tools, small tools.

(Testimony of Robert W. Ward.)

Q. What type of tools?

A. Wrenches, pliers.

Q. Where were they with reference to where the car had left the track?

A. All during the sixty-three lengths and some in the track, some on the toe bar and some down off the toe bar, what is known as the barrow pit.

Q. Did you see any evidence along the tracks or ties of the car having left the rails?

A. Yes, sir.

Q. What did you see in that respect?

A. The flange of the wheels of the motorcar left an indentation in the ties.

Q. At about how far from the point where the car came to rest did you first see such marks?

A. Sixty-three tie lengths.

The Court: Which direction was the car pointed?

A. As a railroad we know it as east and west——

Q. Tell me something I can understand. Was its front end pointed back toward Willcox?

A. No, sir, it wasn't. It was pointed more toward Drury, but not directly parallel with the rails.

Q. (By Mr. Thompson): Now, after you found this stick or stake what became of it at that time?

A. It was taken to the Signal Maintainer's tool house at Willcox and put under lock and key with the motorcar.

The Court: This U-shaped piece of iron you were talking about, what is that?

A. A hanger for a brake rigging that is on the

(Testimony of Robert W. Ward.)

freight cars, in the event the brake rigging should become dislocated this hanger holds it in place until the train crew can discover it or make proper repairs or the train gets into the terminal and the car men make the repairs. It had fallen off of some freight car a long time earlier, because it was rusty and had been laying there quite a long time.

The Court: How big a piece of iron is it?

A. About that long or a little bit longer and about that wide (indicating). It is a square or U-shape.

Q. Just where was that?

A. In the center of the tracks.

Q. Where with reference to the motorcar?

A. About three or four ties east of where the motorcar came to rest.

Q. (By Mr. Thompson): Now, after the stake was taken back do you know what became of the motorcar at that time?

A. I don't quite understand.

Q. What became of the motorcar after you left the scene of the accident, do you know?

A. Yes, I took the motorcar back to Willcox and put it under [107] lock and key in the Signal Maintainer's tool house.

Q. And how was it taken back, who took it back?

A. I called the section foreman; he got his motorcar and pushcar and we put the wrecked motorcar onto the pushcar and hauled it into Willcox.

Q. And where was the motorcar placed then?

(Testimony of Robert W. Ward.)

A. Sir?

Q. Where was the motorcar left at that time?
Where did you put the motorcar that day?

A. In the Maintainer's tool house at Willcox.

Q. At Willcox? A. That is right.

Q. Coming back to this U-shaped piece of iron, you say was in the tracks at that point, where was the motorcar with reference to that U-shaped piece of iron? How far would you say it was from that?

A. About three or four ties west of where the piece of iron was laying in the center of the track.

Q. And the motorcar with respect to the center of the track was where?

A. The motorcar was off of the track to the north side of the track about five feet from the first rail.

Q. Could you say whether or not the U-shaped piece of iron showed any evidence of having been struck or moved recently?

A. It showed no evidence and was replaced right where it was [108] picked up from.

Q. You say you replaced it?

A. That is right, yes, sir.

The Court: You mean you put it back where you found it? A. Yes, sir.

Q. You didn't take it in? A. No, sir.

Q. What was its condition with respect to being bright or rusty?

A. Rusty, looked like it had been laying there for probably thirty or forty days.

Mr. Thompson: Now, are you acquainted with

(Testimony of Robert W. Ward.)

Mr. Lyons, who was then the Assistant Division Engineer for the Tucson Division? A. Yes, sir.

Q. Mr. L. E. Lyons? A. Yes, sir.

Q. Are you also acquainted with Mr. A. C. Jacobson? A. Yes, sir.

Q. What was his position about the time of this accident?

A. He was Signal Supervisor, my immediate superior.

Q. I will ask you whether or not you saw them on the day following the accident.

A. I did, yes, sir.

Q. Did you at that time have occasion to go with them to the [109] point where the motorcar was placed in the tool house? A. I did.

Q. And at that time was the stick in question in the tool house? A. It was.

Q. Did you display it to them at that time?

A. At Mr. Jacobson's request I did.

Q. Do you know whether or not any pictures were taken at that time?

A. I didn't see any taken. I don't know.

Q. So far as you know what became of the stake, Mr. Ward?

A. I don't know, Mr. Thompson. I was packing up to leave there and I turned it over to them.

Q. Did you leave Willcox about that time?

A. I left Willcox on September 1st.

Q. Were you on leave at that time from the Company, or were you working?

(Testimony of Robert W. Ward.)

A. Well, I was on leave and was working both, was on what you call vacation with pay.

The Court: How far are ties apart?

A. There are twenty-four to the rail and thirty-nine foot rails.

Q. Tell me how far they are apart.

A. Exactly, I couldn't tell you, but approximately nine inches. [110]

Q. From the nearest edge to the nearest edge?

A. Yes. I think they are fourteen and a half inch centers, I believe that is correct.

Q. (By Mr. Thompson): Mr. Ward, in connection with your work as Signal Maintainer did you have any experience, familiarity with building of the batteries that are used in the signals of the Southern Pacific? A. Yes, sir.

Q. When you speak of building a battery what is done in that connection?

A. You want that in its entirety from the first move?

Q. Yes. Tell how they are rebuilt, what is used.

A. Any plain water, a little muddy water wouldn't hurt, but ordinarily plain water; and the batteries are, of course, purchased from the Edison Battery Company. They consist of an element, the element is of positive and negative plate, the positive plate is carbon dioxide and the negative plate is zinc. They are assembled in a package of eight to the carton; with each element comes a can of

(Testimony of Robert W. Ward.)

caustic soda. At the present time we receive them in cube form; these little cubes are in this can. In the renewing of the battery the old solution is disposed of by throwing it down over the bank and the jar is cleaned out with water; filled almost to the proper level. The solution is made by inserting the caustic soda in the glass jar and stirring it until all the cubes have been dissolved. [111] The jar is placed in position in the house, battery box we call it, the element is placed into its cover and then put into the solution. If the solution has not been up to its proper level we add a little more water to bring it up, stir it slightly with the element and pour in a bottle of oil.

Q. Now, Mr. Ward, what are these containers, are they glass?

A. They are glass jars approximately fourteen inches in all.

Q. Now, you talk about stirring it, what is used ordinarily by the Signal Maintainer in stirring it when making these batteries?

A. A wooden paddle.

Q. Can you say whether or not when that wooden paddle is inserted in that solution for stirring it has any effect on the wood? A. Yes, sir.

Q. What effect does it have?

A. Sort of a burnt effect or cleaning effect.

Q. Is it quite distinctive, the effect of it?

Mr. Gillen: Just a moment. I am going to offer the objection counsel is leading and suggesting.

(Testimony of Robert W. Ward.)

The Court: Sustained.

Q. (By Mr. Thompson): Describe it the best you can, Mr. Ward, just what happens when you stir the stick into the solution, or solution with the stick.

Mr. Gillen: I offer the further objection to this [112] question, may it please the Court, because I think it is too general a question. I think the type of wood involved, the various things I can see might make a difference in the appearance of a stick.

The Court: He may answer.

A. The paddle, ordinarily the Maintainer makes his own paddle with a pocketknife and piece of board. I use a paddle about two or three inches longer than the jar is.

Q. Mr. Ward, you understand the question. The question was what effect does it have to the stick, tell us that.

A. It leaves a burnt effect on the stick.

The Court: How noticeable?

A. The more often it is the more noticeable it is. The first battery you would build it just sort of takes any paint that might be on off, like a stencil or any grease, leaves it kind of a brownish color.

The Court: Had this stick been painted?

A. Not that I would say, no, sir. It had been weathered, I believe.

Q. (By Mr. Thompson): Talking about the stick or stake you found at that point, did it have the same appearance as a stick that had been used for stirring batteries? A. Yes.

(Testimony of Robert W. Ward.)

Mr. Gillen: Just a moment. If the answer is in I would like it stricken. [113]

The Court: Answer it.

A. Yes, sir.

Mr. Thompson: That is all.

Mr. Gillen: Did Your Honor overrule the objection I started to make?

The Court: Yes. I knew what it was going to be. Cross-examine, Mr. Gillen.

Cross-Examination.

By Mr. Gillen:

Q. Mr. Ward, when did you first encounter the stake that you have described here?

A. Immediately after arriving at the scene of the accident we walked westward to the point where the car had left the track; at that time we found the stake.

Q. What time of day was that?

A. I am not in a position to say, Mr. Gillen, exactly, but somewhere between 2 and I got home that evening about 5.

Q. Who was with you at that time?

A. Mr. Hallmark and Mr. Singleton.

Q. Did you discover the stake?

A. I couldn't say exactly whether I did or whether it was one of those men that spoke first.

Q. Does it refresh your recollection that Mr. Hallmark pointed it out to you and told you he had discovered it previously and left it there for some representative of the railroad [114] to see?

(Testimony of Robert W. Ward.)

A. He may have. I don't recall it though.

Q. Do you recall what was done with the stake at that time?

A. The stake was taken to the motorcar.

Q. By whom?

A. I wouldn't say whether it was him, I or who carried it down there, but one of us three.

Q. And was placed on the motorcar?

A. That is right.

Q. Did you leave it there when you left the scene to go back and arrange to have the motorcar hauled in? A. Yes, sir.

Q. Isn't it a fact that you carried the stake in with you in Mr. Hallmark's automobile to the Willcox yard?

A. I don't recall of it, no, sir.

Q. You considered that stake an important factor in connection with the investigation of this accident, did you not? A. Yes, sir.

Q. You thought that was an important piece of evidence, did you not? A. Yes.

Q. And you thought it was such an important piece of evidence you put it under lock and key at some time that same day? [115]

A. That is right.

Q. You called it to the attention of your superiors? A. At his request.

Q. I say you called it to the attention of your superiors yourself?

(Testimony of Robert W. Ward.)

A. No, he requested where is the stick.

Q. How did Mr. Jacobson find out about it?

A. I couldn't tell you.

Q. Did he know about the stake?

A. I assume. He asked where is the stake. I don't recall saying anything to him about the stake.

Q. Did you report to him about having the car back in the yard, having been out to the scene?

A. I did, yes, sir.

Q. Did you also report to him at that time you had a stick under lock and key you thought had something to do with the accident?

A. I don't recall that.

Q. You thought he knew about it and he might like to see it?

A. As I understand, he talked to Mr. Hallmark and Mr. Singleton before he came to me the next day.

Q. Do you have any recollection now as to who picked the stake up from the ground when you first saw it?

A. I can't get that picture in my mind. I couldn't say, no, sir. [116]

Q. The first time you saw the stake did you recognize any discoloration or deterioration on the stake other than the bruised part of the stake?

A. Yes, sir.

Q. Did you make any comment about it to anybody? A. I don't recall I did.

Q. Did you say to Mr. Hallmark or Mr. Singleton, "That stake has got acid on it?"

(Testimony of Robert W. Ward.)

A. Acid?

Q. Yes. A. No, sir.

Q. Did you observe whether or not the stake had oil on it?

A. I don't recall seeing any oil on the stake.

Q. You do recall seeing the marks, corrosive marks left by acid? A. Not acid, no, sir.

Q. Not acid?

A. No. Caustic soda is not acid.

Q. All right. I probably haven't the technical name. You did immediately perceive the mark left by caustic soda? A. That is right.

Q. And you recognized it as a mark left by caustic sodā? A. Yes, sir.

Q. There is no question in your mind the minute you put your eyes on it it had been in caustic soda?

A. That is right.

Q. Tell me was there any caustic soda or any water or caustic mix on or about the derailed car?

A. There wasn't, no, sir.

Q. No elements that went to make up a battery as you have described a battery being built here or replenished? A. None, no, sir.

Q. As I understood your testimony you were able to follow the course of the car from the time it left the track until the point it came to rest?

A. Correct.

Q. Can you tell us a little something about just what you observed with relation to that course the car had taken?

(Testimony of Robert W. Ward.)

A. The point of the first contact, we will say, of the flange of the wheels with the tie was, as I said, about sixty-three ties from the point where the motorcar came to rest and each tie was marked at an angle bearing toward the north.

Q. Pardon, what you mean by that is there was an indication to you the car was veering off rather than running specifically parallel with the rail?

A. That is correct, yes, sir.

Q. When it came to rest it was completely off the track? A. Yes, sir.

Q. Was there any point along the way you observed where any of the wheels of the derailed car were riding down between the [118] two rails straddling one of the rails?

A. No, sir. One of the sets of wheels was on the north side and the other marks were in the center of the track.

Q. That is what I mean; so that the car for a time at least was straddling one of the rails?

A. Oh, yes. I thought you meant both rails.

The Court: The four wheels.

A. They are a four-wheel car, yes, sir.

Q. Were the two south wheels, were they both off the rails?

A. All four wheels were off the rails, but the motorcar was straddling the north rail to the point where it went off the track.

Mr. Gillen: Finally then it left the track bed completely and was alongside the track?

A. That is right.

(Testimony of Robert W. Ward.)

Q. And was headed railroad east?

A. Not directly parallel with the rail, Mr. Gillen.

Q. I understand that. It had been veering off right along? A. That is right.

Q. It was headed railroad east generally?

A. That is right.

The Court: What does one of these cars weigh?

A. Four hundred and ninety-five pounds, I believe, Your Honor.

Q. (By Mr. Gillen): Now, Mr. Ward, I understood you to testify [119] you had used that very car thousands of miles over the road?

A. That is correct.

Q. There are wooden handles that protrude from each end of that car, are there not?

A. That is correct.

Q. Are they double handles like the handles on a stretcher?

A. That is right, only they are set in the car in such a way if you want to lift on the front end of the car you pull the handles out until they reach a stop, which gives you more leverage and if you want to lift on the rear end you pull the handles back until they reach a stop and that gives you more leverage on the back end.

Q. And the purpose of that is so a man can lift one end and drop it down on the track as you have indicated? A. That is right.

Q. And push his handles through and go around and lift the other end? A. That is right.

(Testimony of Robert W. Ward.)

Q. So one man can dismount the car from the rails?
A. That is correct.

Q. Did you work with Mr. Schnee at any time?

A. I did not, no, sir.

Q. Did you give Mr. Schnee any instructions regarding his work?

A. No, sir, not that I recall. [120]

Q. I understand you said you personally use a paddle that you fashion out of some light wood?

A. That is correct.

Q. Such as an orange box wood?

A. That is what I prefer.

Q. Such as the side slats you find on a box of oranges or apples?
A. That is right.

Q. I understood you to say that you whittle one end of it to make a handle?

A. That is correct.

Q. You want a paddle formed so that you get resistance in stirring like a spoon?

A. That is right, but not too wide.

Q. Did you ever use a grade stake to stir a battery solution?

A. No, in my time I don't ever recall using a grade stake.

Q. Did you ever see a grade stake used?

A. No, I didn't.

Q. Now, I understood you to say, Mr. Ward, that it is the practice of Signal Maintenance Men that when they are going to revive or replenish, whatever might be the term, a battery that is in use it

(Testimony of Robert W. Ward.)

is done right at the scene right at the signal, is that correct? A. That is correct.

Q. What solution is left in the battery is thrown right on the ground, is that correct? [121]

A. The old solution.

Q. Yes, the old solution is thrown on the ground?

A. That is right.

Q. Then the jar that contains the solution is washed out? A. That is correct.

Q. Then the water is poured into the jar, caustic powder is put in, stirred up and the plates put in and installed? A. And connected up.

Q. Do you use any oil?

A. Yes, sir, it is a vegetable oil and comes in a small bottle. It keeps the solution and that hermetically seals itself in there so there will be no evaporation and the solution level is maintained during the life of the battery without adding water.

Q. Mr. Ward, anywhere along the line in the vicinity or proximity of signals along the main line there undoubtedly would be patches on the ground where caustic powder or solution had been thrown?

A. There are, yes, sir.

Q. And I suppose anything that came in contact with that ground while the solution was fresh enough would bear some evidence of coming in contact with that solution?

A. That is correct, until it rains. It dries out and leaves a whitish condition on the soil and the rain, if heavy enough, will dissolve that, wash it away. [122]

(Testimony of Robert W. Ward.)

Q. Did you notice any whitish condition on the soil around the scene?

A. No, no place to build batteries there. There is no cause for building a battery near there.

Q. Is there any regulation where a battery must be built? A. Well, you build the batteries——

Q. I am asking you if there is any regulation you know of where a battery must be built in the rule book or anyplace else? A. No.

Q. It had been raining that day?

A. I don't remember, Mr. Gillen.

Q. Don't you remember whether it had been raining? A. I cannot remember, no, sir.

Q. You know, as a matter of fact, a grade stake could not be used to stir a battery solution in a jar?

A. No, I don't know that.

Q. Isn't it a fact that it would be too cumbersome and wouldn't form enough resistance by its size and shape to properly stir as a thin paddle would?

A. It would be wide enough to cause the resistance to stir the battery, but outside of that it would be too cumbersome.

Q. Now, is it my understanding of your testimony that the first time that you saw Mr. Jacobson looking at the stick was when you exhibited it to him and the Divisional Engineer in the shed where you had placed it under lock and key? [123]

A. That is right.

Q. Where was the stick the last time you saw it?

A. The last time I saw the stick was in the tool

(Testimony of Robert W. Ward.)

house at Willcox on the morning of August 30th.

Q. Mr. Jacobson was with you at that time?

A. That is right.

Q. And the Divisional Engineer, Mr. Lyons?

A. That is right.

Q. And after you exhibited the stick to them did you place it again under lock and key?

A. I never touched it again after that, as I recall.

Q. I understood you to say you were leaving on a vacation?

A. No, I had been out of Willcox and I was packing my furniture to leave there permanently.

Q. So you turned the keys over to Mr. Jacobson?

A. Not the keys, no.

Q. Did you retain the keys?

A. It is a signal lock and all Maintainers have a key to fit that particular type lock.

Q. Do you remember meeting Mr. Schnee and a Mr. Maley from my office at Willcox—I beg your pardon, I am wrong. Do you recall meeting Mr. Schnee and his wife and a gentleman from my office by the name of Mr. Maley at or near Yuma, Arizona, the latter part of December, 1948, or New Year's Day or a day or two thereafter, 1949? [124]

A. Yes, sir. That was at Horn, Arizona.

Q. Horn, Arizona? A. Horn.

Q. Is that the first time you had ever met Mr. Maley from my office? A. That is correct.

Q. Do you recall giving a statement to Mr. Maley at that time? A. I do, yes, sir.

(Testimony of Robert W. Ward.)

Q. Do you recall reading the statement?

A. Oh, yes.

Q. Do you recall signing the statement?

A. That is right.

Mr. Gillen: We would like with the Court's permission to pass the statement to the witness or have it passed to the witness and allow you to look at this, if you will, Mr. Ward. I will show it to counsel first. I want you to look at it and tell me if that is your signature.

The Court: The morning recess for ten minutes.

Mr. Scruggs: We have one witness, a doctor, who is examining some records from the hospital. If there is no objection to his sitting right here; otherwise, we would like to withdraw the exhibit.

Mr. Thompson: We have no objection to him using them here or taking them out, whichever is most convenient to counsel. [125]

The Court: He can take them into my chambers.

Mr. Gillen: Counsel has examined the statement. May I pass it to the Clerk?

(Plaintiff's Exhibit 5 marked for identification.)

Mr. Gillen: May the witness see the statement, please?

The Court: I thought he could read that while I was out. You haven't read it yet?

A. No, sir.

The Court: Step down and read it at your

leisure. Do you have another witness you can put on?

Mr. Thompson: Yes. Call Mr. N. A. Wisner.

Mr. Gillen: It is a very short statement. I don't think it will take long for him to read it.

The Court: All right.

NORMAN A. WISNER

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name, please.

A. Norman A. Wisner.

Q. Where do you reside, Mr. Wisner?

A. Tucson, 849 East Sixteenth.

Q. Where were you residing in August, 1946?

A. In Willcox. [126]

Q. What was your position and employment in 1946? A. Section Foreman.

Q. What section? A. Section?

Q. With respect to Willcox.

A. Section 72.

Q. And with respect to Willcox where was your territory?

A. It was from Mile Post 869 to 1080.

Q. Mr. Wisner, did it cover the territory within two or three miles east of Willcox?

A. Yes, sir.

(Testimony of Norman A. Wisner.)

Q. Do you recall any time in the latter part of August, 1946, having an occasion to go out east of Willcox to bring in a motorcar, a Signal Maintenance motorcar? A. Yes, sir.

Q. Do you recall about what time of day it was?

A. It was along in the afternoon.

Q. With respect to the Willcox yard where did you find the car?

A. Approximately two miles east of Willcox, railroad direction.

Q. When you went out to the point where you found this car how did you go out?

A. Went out on my motorcar.

Q. When you got to the point where did you find this motorcar [127] you mentioned, where was it with respect to the rails?

A. It was hanging over the towline on the north side track, railroad direction.

Q. Are you familiar with motorcars?

A. Yes, sir.

Q. Do you recall which direction the motorcar was pointed? I am talking about the engine end of the motorcar. A. Yes, sir.

Q. How was it pointed?

Mr. Gillen: Just a moment. I offer the objection, if the Court please, it is incompetent, irrelevant and immaterial how this man might say it was pointed when he got out there, due to the fact that it hasn't been established this car's position had not been changed by the various people out on the scene prior to his arrival.

(Testimony of Norman A. Wisner.)

The Court: He may answer.

Q. Can you tell?

A. Yes. The motor end of the motorcar was pointed toward Willcox, west.

Q. And what, if anything, did you do with regard to the motorcar then at that time?

A. I just picked the motorcar up, put it on my pushcar and hauled it back to Willcox.

Q. What was done with it at that time?

A. I put it in the Maintainer's tool house. [128]

Q. Left it there? A. Yes, sir.

Q. In whose custody was it?

A. In the custody of Bob Ward, I suppose. He was Regular Maintainer there.

Q. That was where you left the car at that time?

A. That was where I left the car at that time.

The Court: Which end is the engine end, the front?

A. The engine is in the front end of the motorcar, the running direction of the motorcar.

Cross-Examination

By Mr. Gillen:

Q. Who went out with you to the scene?

A. My section gang.

Q. What was his name?

A. I had four men.

Q. I am asking you who went out with you.

A. Do you want their names?

Q. Did you say section hands?

(Testimony of Norman A. Wisner.)

A. I said section gang.

Q. All right. Give me their names.

A. Frank Sanchez, Ramon Avilla, Suzano Luna and Francisco Garcia.

Q. Can you fix the time of day you went out there?

A. Not exactly. It is approximately along around 3 or 4 [129] o'clock.

Q. Didn't you get an order on it?

A. Get an order to go?

Q. Yes.

A. Yes, Bob Ward asked me to go.

Q. Did you get a written order on it?

A. No.

Q. Did you write a written report on it?

A. No, sir.

Q. Anybody else go with you besides your section hands? A. No.

Q. Did Mr. Ward go? A. No.

Q. He didn't go? A. No.

Q. Do you have any information on what time the accident happened? A. No, sir.

Q. Were you informed the accident happened around 1 o'clock in the afternoon?

A. I was informed the accident happened and asked me to go get the motorcar.

Q. You don't know how many people had touched that car or tampered with that car between the time of the accident and the time you arrived there with your section hands? [130]

(Testimony of Norman A. Wisner.)

A. No, sir, I do not.

Q. You don't know whether the car had been moved or not? A. No, sir.

Q. You have a distinct recollection the car was headed with the motor or front railroad west?

A. Yes, sir.

Q. What leaves that so distinct in your mind?

A. I don't understand your question.

Q. What makes that so distinct in your mind?

A. I distinctly remember it, the way the motorcar was laying.

Q. When did anybody first ask you about which way the motorcar was headed?

A. Well, probably after I got back to Willcox.

Q. Do you remember?

A. Not distinctly, I don't.

Q. Do you remember who asked you? Did you ever discuss it with Mr. Ward? A. Yes, sir.

Q. Did Mr. Ward tell you the motorcar was pointed railroad east? A. No.

Q. I will ask you this, are you acquainted with the City Marshal in Willcox, a gentleman by the name of Dick Hallmark?

A. Yes, sir, I am acquainted with him.

Q. You are acquainted with him? [131]

A. Yes, sir.

Q. Did you ever discuss which way the motorcar was headed with Mr. Hallmark?

A. No. We were talking about the accident that evening in Willcox after we got back; as to the condition of the motorcar it wasn't discussed.

(Testimony of Norman A. Wisner.)

Q. Did you ever give a statement to a Southern Pacific Claims Agent by the name of Caldwell?

A. No, sir.

Q. Who did you give your statement to?

A. The only statement I have given was up here in the Lawyer's office.

Q. Is that the first time you ever told anybody the car was headed railroad west?

A. Yes, sir.

Q. That is the first time you ever did?

A. Yes, sir.

Q. Who suggested that to you?

A. Well, the lawyers.

Q. The lawyers suggested it to you and Mr. Goins, the Claim Agent, suggested it to you?

A. Claim Agent, no.

Q. You know Mr. Goins, the Claim Agent?

A. Sure.

Q. Did he ever talk it over with you? [132]

A. I didn't understand the name.

Q. Did you ever talk it over with him?

A. No, only just slightly was all.

Q. Slightly. During the slight conversation you had with him did he tell you the car was pointed railroad west?

A. No, sir, he didn't.

Q. Was it within your knowledge that City Marshal Hallmark tore up a statement because the Claims Agent had it that the car was pointed west—

Mr. Thompson: I object to that.

(Testimony of Norman A. Wisner.)

Mr. Gillen: May I finish the question?

Mr. Thompson: On the ground it is improper.

The Witness: No, sir, I never.

The Court: He says no.

Mr. Gillen: We are all clairvoyant around here, if the Court please.

The Court: I am pretty good at it.

Mr. Gillen: That wasn't intended as a reflection on the Court.

Mr. Thompson: If the Court please, may I have that stricken on the grounds it is assuming something not in evidence.

The Court: Ask it over again then I will rule.

Q. (By Mr. Gillen): Mr. Wisner, is it within your knowledge, having discussed this accident as you stated with City Marshal [133] Hallmark, City Marshal Hallmark tore up a statement that was being written out by Claims Agent Caldwell because Claims Agent Caldwell insisted in putting into the statement the car was headed railroad west when Mr. Hallmark insisted the car was headed railroad east?

Mr. Thompson: I make the objection and ask it be stricken on the grounds it assumes facts not in evidence and ask the Court to instruct the Jury to disregard the inference.

The Court: Objection overruled. Answer the question.

A. I know nothing about it.

Q. You know nothing about that?

(Testimony of Norman A. Wisner.)

A. I know nothing about the statement.

Q. Is it your testimony now that nobody from the investigative force of the Southern Pacific Railroad ever discussed with you the position of the car or your knowledge of the accident until just recently at the lawyer's office? A. No, sir.

Q. What is it?

A. No, sir, I never discussed it with him.

Q. You were called upon to make that 26-11 in connection with the accident?

A. No, sir, that is out of my department. My department is the Track Department.

Q. Anybody can be called upon to fill out form 26-11? A. Yes, but I was never called upon.

Q. As a Section Foreman you look after the roadbed within a certain area, within your area, is that correct? A. Yes, sir.

Q. What is your duty with regard to keeping the right-of-way, roadbed, clear of obstacles that might cause accidents?

A. Well, we are required to patrol the track, see it is safe for passage of trains at all times and there are no hazards.

Q. If you find part of a brake shoe or part of a steel hanger on the track what is your duty with reference to that, on the bed or right-of-way.

A. Pick it up, take it up and throw it in the scrap pile.

Q. Keep the right-of-way clear, in other words?

A. Yes.

(Testimony of Norman A. Wisner.)

Q. Not only the rails but the portion of the roadbed between the rails? A. Yes, sir.

Q. When had you last patrolled the area between Willcox and two miles east, railroad east of Willcox, to determine if there were any obstacles, objects such as scrap iron, grade stakes or anything of that nature that you would be duty-bound to clear off the right-of-way?

A. The day before that, August 26.

Q. The day before that. Did you do it yourself?

A. My section gang. [135]

Q. Your section gang did it, you say, the day before that, August 26th? Did you say August 26th?

A. I said August 25th.

Q. What did you mean the day before that?

A. I meant I had been over my track August 25th previous to this accident.

Q. Four days before the accident?

A. August 25th.

Q. Yes, sir, four days before the accident. The accident was August 29th.

A. I meant to say the 28th.

Q. What switches it in your mind from August 25th to the 28th, just the fact that an accident happened?

A. Yes. I was thinking about August 26th as the accident.

Q. That is why you said the 25th?

A. That is why I said the 25th.

Q. Did it come to your attention that on the

(Testimony of Norman A. Wisner.)

day of the accident there was noted between the rails in a close proximity to where the accident occurred a piece of metal, U-shaped metal that was rusty and appeared to have lain there for thirty or forty days, found between the rails, did that come to your attention? A. I know nothing of it.

Q. Did it come to your attention when it was found by Maintenance men it was left just where it was found, did that [136] come to your attention?

A. Nothing like that.

Q. When did you next inspect the right-of-way after the accident?

A. Well, I went out that evening and inspected it up to the point of the accident.

Q. Did you find the piece of U-shaped metal there that apparently was part of a brake hanger?

A. No, sir.

Q. Did you ever find that piece of metal there?

A. No, sir.

Q. You never did. Do you ever find grade stakes along the right-of-way?

A. At times we do, yes, sir.

Q. It is a fact, is it not, the railroad surveyors are continuously surveying the right-of-way, isn't that so? A. Yes, sir.

Q. The purpose of that, isn't it, to determine the roadbed is setting at proper angles and hasn't deteriorated or tilted?

A. They are put there for new surface to surface it to the stakes and the center line stakes.

(Testimony of Norman A. Wisner.)

Q. And you frequently find surveyor's stakes sticking in the line and laying on the ground along the right-of-way?

A. We see them once in awhile, not too frequently, because we usually keep them cleaned up.

Q. You usually keep them cleaned up?

A. Yes, whenever we see them.

Q. There are times, are there not, when you are engaged in work which prevents you from making inspections of your right-of-way? A. Sure.

Q. Sometimes a week or two at a time?

A. Never over three days with me.

Q. Never over three days; so it might be three days when the right-of-way would be cluttered up and you wouldn't get around to clearing it off, is that it? A. Yes, sir.

Q. Did you ever have a discussion with anyone other than the lawyers and Mr. Goins just before this trial as to which way the car you took into Willcox, the motorcar that was derailed that you took into Willcox, was headed? A. No.

Q. Is it your testimony, sir, that having hauled in this motorcar on the late afternoon of August 29th, 1946, that without ever referring to its direction, the way it was headed again until just at the time of this trial in 1950 that you remember distinctly the car was headed railroad west?

A. I remember distinctly it was headed railroad west.

Q. How many other motorcars have you hauled in since August 29, 1946? [138]

(Testimony of Norman A. Wisner.)

A. Pardon, I did not understand that.

Q. How many other motorcars have you hauled into the yard? A. None.

Q. How many other kinds of cars have you hauled into the yard since 1946, August?

A. None.

Q. You have never had any participation in any derailment accident since 1946?

A. Pardon me there just a minute, when a train hit a car up at Rodeo I hauled it in.

Q. When was that?

A. That was about, as near as I remember, a year after this. But there were no personal injuries in it.

Q. Did it hit a motorcar?

A. A train hit it, yes, sir.

Q. A train hit a motorcar; can you give us the date of that?

A. No, sir, I cannot. It was in the wintertime; just what date I don't remember.

Q. Now, you remember distinctly, do you not, you examined the right-of-way for obstacles on August 28, 1946; can't you give us the date a year later when you hauled away a motorcar that had been struck by a train?

A. No, sir, I can't. It was in the wintertime. I wasn't called upon to make a report, anything like that.

Q. You were not called upon to make a report on this one? [139] A. No.

(Testimony of Norman A. Wisner.)

Q. Can you tell us which way that motorcar was headed?

A. It was torn up, you couldn't tell which way it was headed.

Q. Can you tell us whether it was lying on its side, right side up, upside down?

A. Scattered over an area about fifty or sixty feet.

Q. You just picked up the pieces?

A. Picked up the pieces is all there was.

Q. Mr. Wisner, when you went out to haul in this motorcar did you make any observations around the scene there? A. Which one do you mean?

Q. The motorcar involved in this case, the one on August 29, 1946, the day after you had inspected the right-of-way.

A. No, I didn't, just looked at the condition of my track.

Q. I didn't understand that.

A. I looked at the condition of my track.

Q. What did you observe about the track?

A. It was in perfect condition. I got my gage on it and there was nothing wrong with the gage or surface.

Q. Did you note anything about the ties?

A. No, the ties were o.k.

Q. Did you note anything about them?

A. I noticed one little mark on the tie just before the motorcar went off.

Q. Just one little mark? [140]

(Testimony of Norman A. Wisner.)

A. Of one tie.

Q. Is that the only scarring you saw on any ties?

A. I think that is all I saw.

Mr. Gillen: That is all.

Mr. Thompson: That is all.

The Court: Where are these grade stakes when you find them, between the tracks?

A. Find them between the tracks and laying along the toobar.

Q. When you find them upright?

A. A center stake is put in the center of the track.

Q. How long are those?

A. About two feet, eighteen inches.

Q. How far above the surface?

A. Just put up about three inches, two and a half or three inches above the tie.

Q. Where does that leave them with reference to the rail? A. About three inches below it.

The Court: That is all from me.

ROBERT W. WARD

recalled, having been previously sworn, testified as follows:

Cross-Examination

By Mr. Gillen:

Q. Did you examine the statement, Mr. Ward?

A. I did, yes, sir. [141]

Q. Is that your signature?

A. That is my signature.

(Testimony of Robert W. Ward.)

Q. Do you recall having read that statement?

A. Yes, I did.

Mr. Gillen: I wonder if I might have the statement.

(Document handed to counsel.)

Q. Mr. Ward, did you ever hear a discussion had anywhere that the railroad company was going to contend that Mr. Schnee was carrying a grade stake in his car to stir up battery solution?

A. I don't recall of ever hearing one, Mr. Gillen.

Q. Isn't it a fact that when this statement was taken from you that Mr. Schnee and Mr. Maley told you that they were informed from talking to persons who had been contacted by the Claims people a year earlier that that was going to be the contention of the railroad? A. I wouldn't deny——

Mr. Thompson: Just a moment. I object to that on the ground that is improper cross-examination.

The Court: He may answer.

A. I wouldn't deny that, but I still don't recall.

Q. Isn't it a fact that that is why you made the statement with reference to the impossibility or impracticability of attempting to use a grade stake for stirring this battery solution? [142]

Mr. Thompson: There is no showing he ever made such a statement, if it please the Court.

The Court: He may answer.

Mr. Thompson: The statement would be the best evidence.

(Question read.)

(Testimony of Robert W. Ward.)

A. To answer that yes or no, I would say no.

Q. Do you have any explanation you would care to make?

A. I made the statement to Mr. Maley and Mr. Schnee at the time that they had contacted me with this reservation: "Anything I can do to help you out I will be glad to, insofar as I can remember I will tell you exactly what took place."

Q. I don't think that is responsive to the question. Well, let it stand. Do you recall why you referred in your statement to the fact that a grade stake would be most impractical to attempt to use to stir a battery solution?

Mr. Thompson: If it please the Court I object to counsel purporting to ask him something from a statement that doesn't appear on the statement.

Mr. Gillen: Counsel has read the statement himself; you will find it appears on the statement.

The Court: Hand me the statement.

Mr. Gillen: I would like permission to read the entire statement to the Jury.

The Court: Good. Put it in evidence first.

(Plaintiff's Exhibit 5 in evidence.) [143]

Mr. Gillen: I take it Your Honor has made a ruling on the objection that was offered?

The Court: We have admitted the statement and you are going to read it.

Mr. Gillen: Yes.

"Statement of Robert W. Ward—Signal Foreman—70 Signal Department—" Is that 70?

(Testimony of Robert W. Ward.)

The Witness: S. P. Company, Signal Department, Signal Gang, yes, sir.

Q. There appears to be something that looks like 70—I see, “c/o Signal Department, Tucson, Arizona.”

“I was signal maintainer at Willcox, Ariz., on August 29, 1946, when Adolph Schnee was injured east of Willcox when the motor car on which he was riding was derailed. I was called by the station agent to identify Mr. Schnee at the doctor’s office which I did and then went out to the scene of the accident. I was present at the time Mr. Albert C. Jacobson picked up the surveyors stake which was apparently the cause of this accident. This stake was about $1\frac{1}{4} \times 1\frac{1}{4}$ and about 30 inches long. I have been a signal maintainer for about 22 years and I have never used a stake of this kind to mix batteries. It would be too large and cumbersome to use, as we use a thin paddle to mix battery solution. After we picked up the tools we placed the car on a push car and took it into the Willcox station. Mr. Norman Wisner, section foreman, [144] Ramon Abilla, section laborer, myself and other laborers picked this car up. We also found a piece of brake shoe laying near the scene of derailment, which had apparently been laying there for some time. Mr. Albert Jacobson signal supervisor, Mr. Lyons Asst. Div. Engr. at that time and another man I believe was Bob Glasser out of the div. engrs. office were with me at the time the stake referred to above was found

(Testimony of Robert W. Ward.)

and this was the day after the accident at about noon. Robert W. Ward, Signal Foreman, Signal Gang 9, Tucson Division.”

Mr. Gillen: Now, Mr. Ward, can you tell us what it was that brought up the topic in your statement, if you remember, with regard to the impracticability if not the impossibility of using a grade stake to mix battery solution?

A. I never used one. They are too large and too cumbersome.

Q. What I am asking you, do you recall what brought that subject up that caused you to refer to it in your statement?

A. I don't recall, no, sir.

Q. Do you recall it was brought to your attention and you had already had information on the fact that it was being contended Mr. Schnee was carrying that stick with him to mix battery solution?

A. As I told you, I don't recall but I don't deny it was called to my attention.

Q. Now, isn't it a fact that you never mentioned to Mr. Schnee or to Mr. Maley that the grade stake you saw out at the [145] scene had any evidence that it had been used in a battery solution?

A. I didn't mention that as I recall, no, sir.

Q. Was there any reason why you didn't mention it to them if you recalled at that time?

A. None whatsoever.

Q. Do you think your memory was better about matters at that time or better now?

(Testimony of Robert W. Ward.)

A. I don't know that it is any different.

Q. You recollect you testified this morning that you went out to the scene first with Mr. Hallmark and you don't know whether you discovered the stake or whether Mr. Hallmark pointed it out to you?

A. That is right.

Q. You noted, did you not, in this statement you said you were with Mr. Jacobson and certain other members of the Southern Pacific Maintenance force and that you were present when Mr. Jacobson pulled up the stake that caused the accident and that was about noon the day after the accident; were you mistaken about that?

A. Could I answer that what I finally told Mr. Schnee?

Q. No, sir, I am asking you to answer the question I put to you, if you please.

A. I don't believe, Mr. Gillen, the statement was Mr. Jacobson pulled the stake up. [146]

Q. Let's read the statement and if you wish I will ask permission of the Court to have it placed back in you hands: "...I was present at the time Mr. Alfred C. Jacobson picked up the surveyors stake...." If I said "pulled" I mislead you. I apologize. Picked up the stake which was apparently the cause of this accident. And at the conclusion of the page you told who was present and said this was noon the day after the accident. Do you wish to see the statement?

A. That statement is in error.

(Testimony of Robert W. Ward.)

Q. That statement is in error?

A. That part of it, yes, sir.

Q. You say it was as you testified this morning, Mr. Jacobson didn't see the stake until you took it out from under lock and key and showed it to him and Mr. Lyons?

A. That is correct.

Q. You can't tell us why you didn't mention, when you made reference to the stake, why you didn't mention in your statement it had corrosive matter on it or the appearance of having been in a corrosive solution?

A. Well, it is better than two years later. It didn't appear to amount to anything. I never even let it enter my mind that it could be of some importance.

Q. But you admit there might have been a discussion to the effect that they were attempting to say Mr. Schnee had that stick and had used it in a solution? [147]

A. That is so.

Q. You stated in your statement that would be most cumbersome and wouldn't be practical to you, is that right?

A. That is right.

Q. Do you say that you were also present when the car was loaded on the flatcar?

A. Yes, sir.

Q. And you were present and heard Mr. Wisner testify, did you not?

A. No, I wasn't. I was out in the hall.

Q. If Mr. Wisner said you were not present when he moved the flatcar with his section hands you would say he was mistaken?

(Testimony of Robert W. Ward.)

A. I would say he was mistaken.

Q. You have a distinct recollection of assisting in the loading of that motorcar onto the flatcar to be hauled into Willcox? A. Yes, sir.

Q. And that was, was it not, Mr. Ward, right after you had left Mr. Hallmark and Mr. Singleton?

A. That is correct.

Q. And that was right after you had first had called to your attention the stake?

A. Not immediately, right after we had returned to Willcox in the automobile.

Q. I understand that, but it was right after the trip where [148] you had gone out there with Mr. Hallmark and Mr. Singleton and for the first time saw the stake? A. Yes, sir.

The Court: Why don't you put on this pad, I would like for you to do it for me, put the rails there and put the car there the way you saw it in relation to the rails.

Mr. Gillen: I have concluded my cross-examination, your Honor, with the exception of whatever your Honor wishes.

The Court: Mark the car front end or rear end, however you do that.

A. All right, sir.

The Court: Pass the sketch down to the lawyers.

(Sketch handed to counsel for plaintiff.)

The Court: When you get through with it take it over to Mr. Thompson.

(Sketch handed to counsel for the defendant.)

(Testimony of Robert W. Ward.)

The Court: Do you want to ask any questions about that or make any use of that?

Mr. Gillen: May I see it once more, please.

The Court: I am not going to force it on you gentlemen.

Mr. Gillen: I think it would be very useful, your Honor.

Q. Mr. Ward, when you drew the diagram for His Honor and indicated east on the diagram you were indicating railroad east, is that correct?

A. Correct. [149]

Q. Looking toward Willcox?

A. No, that is west from the scene of the accident.

Q. That is right, looking away from Willcox is what I meant to say. A. That is right.

Q. And that is the way the front of the car was pointed? A. Yes, sir.

Q. Railroad east away from Willcox?

A. That is correct.

Mr. Gillen: I should like with the Court's permission to have the diagram Your Honor had drawn marked as an exhibit for the plaintiff.

The Court: Very well. Pass it around to the Jury after it is marked.

(Plaintiff's Exhibit 6 in evidence.)

Redirect Examination

By Mr. Thompson:

Q. Do you recall when Mr. Maley took this statement from you, Mr. Ward?

(Testimony of Robert W. Ward.)

A. You mean the exact date?

Q. Yes.

A. It was a Sunday afternoon and I believe it was at least two weeks in January of 1948.

Q. It was January, 1948?

A. I think so. [150]

Q. Did you have occasion to make any written report of this accident immediately following the time of the accident, Mr. Ward?

A. Yes, I did.

Q. And was that statement made within a matter of a few weeks or a few days from the time of the accident?

A. I don't recall the exact time, but it was shortly after the accident.

Q. Was the statement then made you made for the benefit of the Company? A. Yes, sir.

Q. And you told in that statement what you then recalled had happened, is that correct?

Mr. Gillen: Just a moment. I object to leading and suggestive questions and also the statement would be the best evidence.

Mr. Thompson: If it please the Court, I think this is a very proper question to ask him.

The Court: You are going to put the statement in, aren't you?

Mr. Thompson: Yes.

The Court: Let us get it marked.

(Defendant's Exhibit A marked for identification.)

The Court: Now, Mr. Gillen will have to have a chance to look that over in fairness, so if you have another witness to [151] put on for the next fifteen minutes Mr. Gillen can look that over during the recess.

DAVID WISNER, JR.

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

The Court: How many witnesses do you have on liability?

Mr. Thompson: I want to cross-examine the plaintiff and we have two witnesses there at the scene of the accident.

Q. (By Mr. Thompson): State your name.

A. David E. Wisner.

Q. Where do you reside, Mr. Wisner?

A. Bowie, Arizona.

Q. And what is your position with the S. P. Company? A. Roadmaster.

Q. How long have you been so employed?

A. About eight years.

Q. And were you so employed on August 29, 1946? A. Yes.

Q. Do you recall having been in Willcox on the date of August 29, 1946? A. Yes.

Q. What fixes that date in your recollection?

A. Well, I made a motorcar trip with Mr. Lyons

(Testimony of David Wisner, Jr.)

who was then [152] Assistant Division Engineer on the Tucson Division. We went from Bowie to Cochise.

Q. Just a moment, was that trip that fixed it——

A. No, reviewing a statement I made to the Superintendent shortly after this accident happened.

Q. Did you know the plaintiff, Mr. Schnee?

A. I had seen him a few times.

Q. Did you hear of an accident he had out there?

A. The following day.

Q. The following day? A. Yes.

Q. And it was, now, coming back to August 29th then what did you do that day? Just tell the Jury briefly and who was with you?

Mr. Gillen: Just a moment. If he didn't hear about the accident until the following day I object to the question as incompetent, irrelevant and immaterial and having no bearing on the issue.

Mr. Thompson: The purpose is to show he passed over and back over this same track.

Mr. Gillen: This would be incompetent, irrelevant and immaterial. So did Schnee.

The Court: He may answer.

A. Mr. Lyons and myself left Bowie between 7 and 8 o'clock in the morning, made a motorcar trip to Cochise. Mr. Lyons [153] left me there and continued on west. I returned to Willcox that day and ate lunch and between 12:30 and 1 o'clock I put my motorcar on and started back to Bowie, continued back to Bowie.

(Testimony of David Wisner, Jr.)

Q. As the Roadmaster is it your duty to inspect the roadway? A. Yes, sir.

Q. Is that part of your duty? A. Yes.

The Court: Is that what you were doing?

A. Yes.

Q. (By Mr. Thompson): Are you familiar with the first signal containing the block signal west of Willcox, were you familiar with that?

The Court: West?

Mr. Thompon: I mean east of Willcox.

A. Approximately.

Q. Did you have occasion to pass over all the track between Willcox, the mainline between Willcox and Bowie, is that correct, that day?

A. Yes.

Q. First going and then returning to Bowie?

A. Yes.

Q. You made the last trip, you say, sometime after lunch? A. Yes.

Q. Now, where is Cochise and where is Bowie with reference [154] to Willcox?

A. Cochise is west from Willcox approximately nine or ten miles and Bowie is twenty-four miles east of Willcox.

Q. Are they both on the main line of the Southern Pacific? A. Yes.

Q. Did your motorcar experience any difficulty at any point along the line that day particularly as you passed east from Willcox? A. No.

Mr. Gillen: I offer the objection it is leading and

(Testimony of David Wisner, Jr.)

suggestive, cross-examining his own witness and it is incompetent, irrelevant and immaterial whether or not he encountered any difficulty.

The Court: Answer.

A. No.

Q. Did you see or observe any obstruction on the rails as you passed from Willcox east that day going towards Bowie in the afternoon?

A. No.

The Court: Was there anything between the rails?

A. No.

Q. (By Mr. Thompson): Did you see Mr. Schnee at any time that day, Mr. Wisner?

A. After I placed my motorcar on the track I heard a train coming from the east some four or five miles from Willcox. The [155] motorcar and myself went to the east switch, set our car over and back into the siding.

Q. Where was that in Willcox?

A. East switch at Willcox.

Mr. Gillen: May we have the time of day?

A. Between 12 and 1 o'clock, 12:30 and 1. I observed the Signal Maintainer bring his motorcar from the tool house, place it on the mainline headed west; about that time the block signals went up and he run his motorcar to the west switch, set it over on the side and backed up to the tool house and that is the last I observed.

Mr. Gillen: I move that be stricken as incompetent, irrelevant and immaterial.

(Testimony of David Wisner, Jr.)

The Court: It is stricken, disregard it.

Mr. Gillen: May I respectfully request that the Jury be admonished to disregard it?

The Court: I did.

Mr. Henderson: The position of Mr. Schnee shortly before he made this trip headed west I think is extremely important.

The Court: Isn't this the day before?

Mr. Henderson: No, the same afternoon, Your Honor, between 12:30 and 1 o'clock.

Mr. Gillen: This is the lunch hour in the yard, an hour before this man started out.

The Court: I thought he went over the line the day before. [156]

Mr. Thompson: No, Your Honor, the same day before the accident.

The Court: Witness, when did you make the inspection of the track—oh, yes, you heard about the accident the next day, didn't you?

The Witness: Yes.

The Court: You are talking about the day after the accident?

The Witness: Yes.

Q. You made this inspection east of Willcox the day after the accident?

The Witness: The day of the accident.

The Court: What time did you leave Willcox?

A. Between 12:30 and 1 o'clock. I arrived back to Willcox from Cochise, went and ate lunch and proceeded to Bowie.

(Testimony of David Wisner, Jr.)

The Court: I had my days wrong. Now, ask your question again.

Q. (By Mr. Thompson): I asked you if you saw Mr. Schnee at any time the day of August 29, 1946.

Mr. Gillen: To which I offer the objection it is incompetent, irrelevant and immaterial unless he saw him by the scene.

The Court: Overruled. Answer yes or no.

A. Yes.

Q. And where did you see him and what was he doing? [157]

A. He took his motorcar up to the main line headed west and when this train entered the block he run it up to the west switch, run it over and backed it up to his tool house.

Mr. Thompson: That is all.

Mr. Gillen: Now, I renew my objection and move the answer be stricken. This was during the noon hour between 12 and 12:30.

Mr. Thompson: 12:30 and 1.

Mr. Gillen: I beg your pardon. This man said he resumed his trip on between 12:30 and 1 and pulled his car up to get——

The Court: Complete your objection, then I will rule.

Mr. Gillen: I move it be stricken as incompetent, irrelevant and immaterial, if it please the Court. What he saw Mr. Schnee doing in the yard at Willcox during the noon hour, particularly with

(Testimony of David Wisner, Jr.)

reference to backing his motorcar up into the work shed would have absolutely no *bearing how* he placed his motorcar or what happened to his motorcar a half hour or better than a half hour after this man admits he left the yard. This gentleman says he left the yard between 12:30 and 1 to continue his journey. Mr. Schnee testified his lunch hour was 12 to 1 and it was some several minutes after it he started out, went out to this signal and found he didn't have the material, came back to Willcox and got his material and went out to the signal again and the accident. It is entirely [158] too remote. I ask it be stricken and the Jury admonished to disregard it.

The Court: Motion denied. It may stand.

Cross-Examination

By Mr. Gillen:

Q. You were making an inspection of the road-bed, were you. A. Yes, sir.

Q. Did you see anything along the roadbed that formed an obstacle that you as Roadmaster would want removed? A. No, sir.

Q. Did you pass the scene that you later learned was the scene of the accident?

A. At what time?

Q. Any time. A. That day, yes.

Q. What time?

A. Sometime during the morning I went west over it and sometime between 12:30 and 1 o'clock I went east back over it.

(Testimony of David Wisner, Jr.)

Q. When you went east back over it between 12:30 and 1 o'clock did you observe any obstacle in the roadbed? A. No, sir.

Q. Any foreign object in the roadbed?

A. No, sir.

Q. Did you observe a brake shoe or U-shaped piece of metal appearing to be a brake hanger?

A. No, sir.

Q. Did you observe a grade stake?

A. No, sir.

Q. You see lots of grade stakes along the right-of-way?

A. As a rule they are placed for grade raising purpose.

Q. You see lots of them along the right-of-way, don't you? A. Not lots of them.

Q. You see many of them?

A. I see some, yes.

Q. You know the survey parties for the Southern Pacific are constantly at work and constantly putting up their grade stakes? A. Yes.

Q. That goes on day in and day out?

A. Yes.

Q. In the course of being a Roadmaster you have seen lots of grade stakes sticking up and lying down between the rails and alongside, parallel?

A. I have seen them sticking up. I have never seen them between the rails.

Q. Your father testified he had seen many lying between the rails. You have never seen them?

(Testimony of David Wisner, Jr.)

A. No, sir.

Q. When you see a piece of metal between the rails such as a brake shoe or any object of that kind, what within the course [160] of the safety rules and your particular duties do you do about it?

A. I observe it; if enough to do any damage to anything I stop and remove it from the track.

Q. You stop and remove it from the track?

A. Yes.

Q. You are the one that determines whether or not it is dangerous?

A. If I observe it, yes.

Q. I say, you are the one when you observe something, you are the one that determines whether it is dangerous? A. Yes.

Q. If you don't think it is dangerous you don't remove it? A. Yes.

Q. So if you see a big U-shaped piece of metal off a brake hanger, would you leave that laying if you found it lying between the ties?

A. If it is down below the ties, possibly, yes.

Q. Isn't it the duty of the section gangs to keep the right of way completely clear of any foreign object?

A. They are supposed to keep the scrap cleaned off, yes.

Q. If you see objects along the right-of-way, do you call it to the attention of your section crews?

A. Yes.

Q. Do you ever hold any investigation or take

(Testimony of David Wisner, Jr.)

any disciplinary [161] measures against section crews for not keeping right-of-ways clear?

A. I haven't but it has been done, I presume.

Q. It has been done. You say you didn't know Mr. Schnee?

A. I didn't know him personally.

Q. And you say that you had seen him?

A. I had seen him a number of occasions, yes.

Q. Before this day? A. Yes.

Q. Where was the first occasion?

A. When he was maintainer at Willcox.

Q. How long before this day?

A. I can't recall that.

Q. Sir?

A. That is too far back, I can't recall it.

Q. You can recall you saw him moving his car and backing it up against the shed?

A. That was brought to my mind by reading the statement I made shortly after the accident.

Q. Where were you first encountered to make a statement? A. That I don't recall.

Q. You don't remember that? A. No.

Q. By whom were you encountered to make a statement?

A. In the superintendent's office. [162]

Q. And to whom did you make the statement?

A. I wrote the statement out myself and mailed it in to the superintendent's office.

Q. When?

A. Some time after the accident, I don't remember the date.

(Testimony of David Wisner, Jr.)

Q. Who told you it was this man you had seen moving the car that was involved in the accident?

A. Will you state that question again?

Q. Who told you it was this man that you had seen moving this car that was involved in the accident?

A. Different ones and from reports, a wire report on it.

Q. A wire report? A. Yes.

Q. When did you receive the wire report and where? A. I didn't receive one but I saw it.

Q. When did you see it and where?

A. It was possibly mailed to me later when I was asked to make a report on it.

Q. You don't remember? A. No.

Q. What were you carrying in your car that day?

A. All I had on my car was a track level to determine the gauge and level of the track.

Q. That was all? A. That is all. [163]

Q. No tools, nothing but a track gauge?

A. That is right, just small tools.

Q. Carrying no wood? A. No.

Q. When did you last inspect your car to determine what you had on board?

A. Before I left.

Q. You made an inspection to find out what you had on the car between seven and eight that morning? A. Yes.

Q. Anybody use that car besides you?

(Testimony of David Wisner, Jr.)

A. No.

Q. Nobody uses that car besides you?

A. No.

Q. You took Mr. Lyons to a certain point, let him off and went on about your affairs, is that correct? A. Yes.

Q. Why were you inspecting the road that particular day?

A. It is my duty, I go over it once or twice every week to inspect. At that time Mr. Lyons wanted to make this trip. Whenever I pass over it I am always looking at the track.

Q. Was it a regular inspection tour or were you accommodating Mr. Lyons, the assistant divisional engineer? A. You can say both, I guess.

Q. When had you last inspected the roadbed?

A. I can't remember.

Q. You can't remember. When had you last seen Schnee prior to this?

A. That I can't remember either.

Q. And while you were inspecting the roadbed that day, did you encounter any surveying parties of the Southern Pacific? A. No.

Q. Nowhere between the point west to the point east of Bowie? A. Not to my memory.

Q. Did you encounter any section gangs?

A. Yes.

Q. Where?

A. That I can't remember where. There are two gangs working between Bowie and Willcox, there are two section gangs.

(Testimony of David Wisner, Jr.)

Q. You don't know where you encountered them?

A. I don't know where I encountered them.

Q. Did you encounter both of them?

A. Yes.

Q. Bowie is east of Willecox, isn't it, railroad east?
A. That is right.

Mr. Gillen: I think that is all.

Mr. Thompson: That is all.

The Court: We will resume at 1:30.

(Whereupon, a recess was taken at 12:00 o'clock, noon, until [165] 1:30 o'clock, p.m.)

ROBERT W. WARD

recalled as a witness, having been previously sworn, testified as follows:

Redirect Examination

By Mr. Thompson:

Q. Before you left the stand I asked whether or not you made a statement to the Southern Pacific?

A. I did.

Q. You had seen that statement prior to the time you came on the stand this morning?

A. Yes, sir.

Q. And had refreshed your recollection from that statement?
A. Yes, sir.

Q. At the time of the accident I will ask you whether or not it was any part of your duty to investigate accidents?
A. No, sir.

Q. Did you occupy any position with the signalmen's union?
A. I did.

(Testimony of Robert W. Ward.)

Q. What was it?

A. Local chairman of the grievance committee.

Q. It was your duty to represent the men in that department?

Mr. Gillen: Just a moment. That is objected to as incompetent, irrelevant and immaterial.

The Court: He may answer. [166]

A. Yes, sir.

Q. You mentioned in your direct testimony the markings you said were on the stick or stake that was found at the scene of the accident. Were those markings completely around the stick or only on one side?

A. All around the stake.

Q. To about what height?

A. About twelve inches.

Q. Now, Mr. Ward, I will ask you again about these battery jars, how wide and how deep did you say they were?

A. About fourteen inches deep and about four inches by five and a half. They are a little bit oblong, not oblong—what shape is that—a little wider than—

Q. A little longer than they are wide?

A. That is right.

Q. I think you were handed the Defendant's Exhibit A. Did you see that? Was that handed to you this morning?

A. Not this morning.

Q. Will you examine it and see if that is the statement you referred to?

A. Yes, sir, it is.

(Testimony of Robert W. Ward.)

Mr. Thompson: We offer the statement in evidence.

Mr. Gillen: Of course we will object to that. I would like to examine the witness on voir dire first as a basis for my objection. [167]

The Court: All right.

Q. (By Mr. Gillen): Mr. Ward, at the time you made that statement was Mr. Schnee present?

A. No, sir.

Q. Mr. Schnee at that time was confined in the hospital recovering from his injuries or being treated for his injuries? A. That is correct.

Mr. Gillen: I offer the objection the statement would be completely hearsay as to the Plaintiff Schnee, and it is offered as a self-serving statement of the defendant.

The Court: It is admitted.

(Defendant's Exhibit A in evidence.)

Mr. Thompson: May we read it to the Jury? First, the date of the statement, was it taken on the date it bears?

The Witness: I didn't observe the date.

Mr. Gillen: Now, I would like, before counsel reads the statement, in support of my previous motion I would like to supplement that with an objection that the statement contains numerous conclusions not based upon fact. I would like Your Honor to have the opportunity to look at the statement.

The Court: I will read it.

(Testimony of Robert W. Ward.)

(Document handed to Court.)

The Court: It is admitted.

Mr. Thompson: I may read it then.

“Southern Pacific Company Statement Relating to Accident. [168]

“I was signal maintainer at Willcox, Arizona, on Aug, 29, 1946, when Adolph Schnee was injured east of Willcox when the motor car on which he was riding was derailed. I was called by the station agent to identify Mr. Schnee at the doctor's office which I did and then went out to the scene of the accident. I was present at the time Mr. Albert C. Jacobson picked up the surveyors stake which was apparently the cause of this accident. This stake was about $1\frac{1}{4} \times 1\frac{1}{4}$ and about 30 inches long. I have been a signal maintainer for about 22 years and I have never used a stake of this kind to mix batteries. It would be too large to mix battery solution. After we picked up the tools we placed the car on a push car and took it into the Willcox station. Mr. Norman Wisner, section foreman, Ramon Abilla, section laborer, myself and other laborers picked this car up. We also found a piece of brake shoe laying near the scene of derailment, which had apparently been laying there for some time. Mr. Albert Jacobson, signal supervisor, Mr. Lyons, Asst. Div. Engr. at that time and another man I believe was Bob Glasser, out of the div. engr. office, were with me at the time the stake referred to above was

(Testimony of Robert W. Ward.)

found and this was the day after the accident at about noon. Robert W. Ward, Signal Foreman, Signal Gang 9, Tucson Division."

Q. (By Mr. Thompson): Was this stick or stake about which you testified, Mr. Ward, too large to have been put in a battery jar? [169]

A. I didn't hear that question, I am sorry.

(Question read.)

Mr. Gillen: I object to that question as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. No.

Mr. Thompson: That is all.

Recross-Examination

By Mr. Gillen:

Q. Did you talk to anybody over the noon hour, Mr. Thompson or Mr. Goins, the Claims Adjuster?

A. Relative to this, no, I didn't talk to either one of those gentlemen over the noon hour.

Q. Did you talk to anybody about your testimony or statement? A. No.

Q. You did not, over the noon hour. When did you last talk to them, to either of the attorneys or Mr. Goins?

A. I don't know what time but I talked to them yesterday.

Q. Yesterday? A. Yesterday.

Q. Now, did you talk to any of the other witnesses today about your testimony?

(Testimony of Robert W. Ward.)

A. Not about testimony, no.

Q. Did you talk to Mr. Wisner, Senior, about your testimony? A. I did not, no, sir. [170]

Q. You didn't tell him he was mistaken when he said he had gone out?

A. I did not, no, sir. I don't know that he said that.

Q. You didn't ask him about it?

A. No, sir.

Q. Now, with regard to this stake you referred to in your statement given to the Company, who was it that suggested to you that it was used to stir battery solution?

A. I don't remember that it was anybody, Mr. Gillen.

Q. You had never seen one used for that purpose, had you?

A. Not a surveyor's stake, no, sir.

Q. And you had trained men to be maintainers, had you not? A. I beg your pardon?

Q. You had trained men to be signal maintainers? A. That is correct.

Q. You had shown them how to build batteries, had you not? A. That is correct.

Q. When you showed them how to stir the solution you showed them how to stir it with a light wood paddle? A. That is correct.

Q. So with regard to this surveyor's stake that was found and placed under lock and key and since disappeared for some reason, all you can testify

(Testimony of Robert W. Ward.)

to is you observed some discoloration on the stick you concluded to be this solution?

A. That is correct. [171]

Q. You don't know whether it was that solution that left that marking on the stick, you don't know whether it was because it was used to stir a battery or because it had picked it up by lying on the road-bed, is that right?

A. No, I wouldn't say it that way if I understand your question correctly.

Q. Well, if you don't understand it I will try to clarify it. A. I wish you would.

Q. You don't know whether this stick ever was used to stir a battery?

A. I never saw it used to stir a battery, no, sir.

Q. Just your conclusion?

A. Just my conclusion.

Q. Was this stick, to your knowledge, ever put to a test to determine what this discoloration was? Was it tested chemically?

A. Not that I know of.

Mr. Gillen: That is all.

Mr. Thompson: That is all.

Q. (By The Court): That statement says a part of the stick was wedged under the car, is that so?

A. Yes, sir, part of a stick. Did it say "the stick?"

Q. Part of a stick. A. That is correct.

The Court: Do you want to ask him any more?

Mr. Gillen: That is all.

Mr. Thompson: That is all.

J. M. CARROLL

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Mr. Thompson: May I have these marked for identification as one exhibit?

(Exhibit B marked for identification.)

Q. Will you state your name for the record?

A. James M. Carroll.

Q. Where do you reside, Mr. Carroll?

A. 3209 North Geronimo Avenue, Tucson.

Q. How long have you resided in Tucson?

A. Since about 1935.

Q. What is your present occupation?

A. General contractor.

Q. What was your employment in August and September and October, 1946?

A. Junior Engineer, Engineering Department, Southern Pacific Company.

Q. As such junior engineer, did you from time to time have occasion to take pictures? [173]

A. I did.

Q. Referring to the Defendant's Exhibit B for identification, will you examine those pictures and say whether or not you have seen them before?

(Testimony of J. M. Carroll.)

A. Yes, I took these pictures.

Q. Do you recall when and where?

A. I took them at the Tucson yards in October of 1946.

Q. And at whose request, if you know?

A. The Claims Department.

Q. And with respect to the yards, whereabouts in the yards were they taken?

A. Up at the motor car yards, up by the motor car shop.

Q. And they were all taken the same day?

A. Yes.

Q. With what equipment were they taken?

A. I used, I believe at that time I used a 4/5 Speed Graphic.

Q. Those pictures are a fair representation of the motor car which was exhibited to you at that time?

A. Yes.

Mr. Thompson: I believe that is all.

Mr. Gillen: No questions.

The Court: Is that the motor car?

Mr. Thompson: Yes, we will avow it is. This witness, I am not able to establish it by him.

The Court: But you intend to? [174]

Mr. Thompson: I intend to establish it. The exhibit remains as an exhibit for identification.

The Court: You haven't offered it?

Mr. Thompson: I intend to, Your Honor, but I thought I would wait until I had identified it further.

R. F. GLASSER

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name?

A. R. F. Glasser.

Q. Where do you reside? A. Tucson.

Q. What is your occupation?

A. Road man.

Q. Road man? A. Yes, sir.

Q. How long have you been employed as a road man? A. As a road man a little over a year.

Q. Prior to that time what was your employment with the Southern Pacific Company, calling your attention to August and September, 1949, what was your employment at that time?

The Court: 1946.

Mr. Thompson: 1946, I mean. [175]

A. I was a road man at that time.

Q. Did you ever act as a photographer for the company at any time? A. Yes, sir.

Q. During 1946? A. Yes, sir.

Q. And took pictures for the Claims Department, did you? A. Yes, sir.

Q. As a part of your regular employment?

A. Yes, sir.

Mr. Thompson: Might we have these marked as Defendant's Exhibit C and number them in consecutive order.

(Testimony of R. F. Glasser.)

(Defendant's Exhibits C-1 to C-5, inclusive, marked for identification.)

Q. (By Mr. Thompson): Mr. Glasser, at any time in the latter part of August, 1946, did you have occasion to take any pictures at the scene of an accident near Willcox? A. Yes, sir.

Q. And who was with you when such pictures were taken? A. Mr. Jacobson.

Q. Mr. Jacobson? A. Yes, sir.

Q. What are his initials?

A. A. C. Jacobson.

Q. What was his position with the Company?

A. Assistant Signal Supervisor.

Q. Do you recall the first date you took any pictures with reference to a motor car accident east of Willcox in August, 1946, in September, 1946?

A. August 30th, 1946.

Q. And how do you fix that in your mind, Mr. Glasser, the date?

A. I just remember the date.

Q. Will you look at Defendant's Exhibit C-1 to C-5 and state whether or not you have seen those pictures before. A. Yes, sir, I have.

Q. Calling your attention now to C-1, the top one, where was that picture taken and what does it purport to represent?

A. That was taken in front of the motor car tool house at Willcox.

Q. And on the date you have mentioned?

(Testimony of R. F. Glasser.)

Q. And what does it purport to show?

A. It shows a piece of stick wedged——

Q. The whole picture?

A. It shows the underneath side of a motor car.

Q. Of a motor car? A. Yes, sir.

Q. Did you have any conversation concerning the motor car, where it came from, or did you know where it was before you [177] started taking the pictures of it? A. Not at this time.

Mr. Gillen: Well, if Your Honor please——

The Court: He says he doesn't know.

Q. (By Mr. Thompson): Where was it when you saw it on that date?

A. At the tool house.

Q. Was it outside the tool house?

A. No, sir, inside the tool house.

Q. C-2 for identification, what does that purport to represent and where was it taken?

A. It was taken in front of the tool house at Willcox and also shows the motor car.

Q. Was it the same date? A. Same date.

Q. And C-3, where was that taken; what does it purport to show?

A. It shows the track at the point of the accident, where it took place.

Q. You say the point of the accident. Where were you when you took that picture?

A. In reference to what?

Q. Where were you? In what part of the country were you? A. I was east of Willcox.

(Testimony of R. F. Glasser.)

Q. Do you know how far? [178]

A. No, I don't.

Q. How did you fix the place? Who fixed the place for the taking of the picture? Who told you to take the picture at that point?

Mr. Gillen: That would be hearsay, incompetent, irrelevant and immaterial.

The Court: Answer it.

A. I believe Mr. Jacobson.

Mr. Gillen: Just a moment, I move it be stricken if he is not sure.

The Court: Denied.

Q. Was Mr. Jacobson with you at that time?

A. Yes, sir.

Q. Of the next number, C-4, where was that taken and what does it purport to represent?

A. It is a picture of a tie.

Q. And is there anything unusual portrayed in that picture about that tie?

Mr. Gillen: Now, if it please the Court, the picture, if it is admissible at any time, speaks for itself and the photographer's conclusion or description of it is circumventing any ruling the Court might make.

The Court: All right. Sustained.

Q. (By Mr. Thompson): Did you examine the ties there at that place and time, Mr. Glasser?

A. Yes, sir.

Q. What if anything, of an unusual nature did you find at that point with respect to any ties you yourself saw?

(Testimony of R. F. Glasser.)

A. An indentation in the tie and ballast where something had struck.

Q. Did you take a picture of that scene?

A. Yes, sir.

Q. And that is Defendant's Exhibit C-4 for identification, is it? A. What is that?

Q. What you saw at that time is portrayed by Defendant's Exhibit 4 for identification?

A. Yes, sir.

Q. Now, Defendant's Exhibit C-5 for identification, what does that purport to show?

A. That is another picture of the track; also shows the indentation of the same tie in the other photograph.

Q. Those pictures, you saw the objects there of which those are pictures, there at that time?

A. Yes, sir.

Q. Do they fairly portray the objects of which the pictures are taken? A. Yes, sir.

Mr. Thompson: We would like at this time to offer in evidence the Defendant's Exhibits C-1 to 5 for identification, [180] if it please the Court.

The Court: Has Mr. Jacobson been a witness?

Mr. Thompson: No, he will be a witness.

The Court: This is subject to his identifying the location?

Mr. Thompson: Yes, Your Honor.

Mr. Gillen: Your Honor, certainly with regard to the motor car that is referred to in the earlier exhibits, in that same exhibit there has been no

(Testimony of R. F. Glasser.)

foundation laid to show this was the car involved that was portrayed by these pictures. With regard to the photograph of a scar on a tie, this photographer observed himself, I suppose that would be sufficient.

The Court: After they all have been coupled up, renew your objection, counsel. You took these pictures, did you?

The Witness: Yes, sir.

(Defendant's Exhibits D-1 to D-5 marked for identification.)

Q. (By Mr. Thompson): Will you examine those, starting with the one on top and tell me whether or not you have seen those pictures before?

A. Yes, I did.

Q. Who took those pictures, if you know?

A. I did.

Q. And where? A. At Tucson. [181]

Q. And when? Do you recall?

A. Around or about September 16th.

Q. And at whose direction did you take them?

A. Mr. Caldwell.

The Court: 1946?

The witness: Yes, sir.

Q. (By Mr. Thompson): At whose direction did you say? A. Mr. Caldwell.

Q. With respect to the yards, you say the Tucson yards, whereabouts in the yards were they taken?

A. Just east of the Broadway subway.

(Testimony of R. F. Glasser.)

Q. And in taking them in order, I will ask you this question, do all those exhibits from D-1 to D-5 inclusive, purport to show a motor car?

A. Yes, sir.

Q. And you saw the motor car there at that time, took the pictures? A. Yes, sir.

Q. The pictures fairly portray the motor car that was there at that time? A. They do.

Q. And you took them, is that right?

A. Yes, sir.

Mr. Thompson: That is all.

Cross-Examination

By Mr. Gillen:

Q. Do you have the negatives of those pictures?

A. No, sir, I don't.

Q. Were they originally blown into that particular size print? A. I don't know.

Q. Didn't you develop them?

A. No, sir, I only took the pictures.

Q. What did you do, take the pictures, then turn all the negatives, the film over to somebody?

A. Yes, sir.

Q. To whom?

A. To my supervisory officer.

Q. Who is that?

A. Mr. T. W. Saul's office.

Q. And that was the way both with regard to the pictures you took with Mr. Jacobson you understood to be the scene of the accident and the pictures

(Testimony of R. F. Glasser.)

you took in Tucson at the direction of Mr. Caldwell, the claims man, is that correct? A. Yes, sir.

Q. Are you acquainted with a city marshal of the town of Willcox, named Hallmark?

A. No, sir.

Q. Did you ever ask a police officer in Willcox to take you out to the scene of the accident? [183]

A. No, sir.

Q. You have no idea who developed the pictures?

A. No, sir.

Q. How many other pictures have you taken since you took those?

A. You mean of this accident?

Q. Since you took those pictures how many other pictures of accidents of cars or equipment or locations have you taken for the Southern Pacific?

A. I have taken lots of them.

Q. When you look at your pictures do you have a distinct recollection of seeing those things?

A. Yes, sir.

Q. You are not confused by the lots of other pictures you have taken? A. No, sir.

Q. When you were taking the pictures at Tucson with Mr. Caldwell, were there any objects placed in and about or upon any of the objects in the picture? A. Will you say that again?

Q. Were there any objects, any articles, placed on the motor car, in or about the motor car before you took the pictures? A. Only one.

Q. There was one; by whom was that placed?

(Testimony of R. F. Glasser.)

A. Myself and Mr. Caldwell. [184]

Q. You both placed an object on the motor car?

A. Not on the motor car, underneath the motor car.

Q. Underneath the motorcar, I see. I think that is all.

Redirect Examination

By Mr. Thompson:

Q. Will you look at the exhibit and give the number you refer to in giving answer to counsel's question? A. D-3.

Q. D-3 for identification; what was the object you referred to placing under it?

A. It was a stick.

Mr. Thompson: That is all.

Mr. Gillen: That is all.

Mr. Thompson: We will call Mr. Schnee for cross-examination.

ADOLPH J. SCHNEE

called as a witness by the defendant, having been previously sworn, testified as follows:

Cross-Examination

By Mr. Thompson:

Q. You have been sworn previously and testified, Mr. Schnee, in this case? A. Sir?

Q. You have been sworn previously and testified in this case?

(Testimony of Adolph J. Schnee.)

Mr. Gillen: It is stipulated he has. [185]

Q. Will you tell me when it was you entered the employ of the Southern Pacific Company, the date?

Mr. Gillen: Just a moment. I offer objections. It is incompetent, irrelevant and immaterial. I understand this witness is being called under the cross-examination rule, which we call 2055 in the California Code of Civil Procedure. I don't know what it is here; the right to cross-examine the adverse party on what I understand Your Honor has limited the liability in the case. I think the examination should be held to that.

The Court: At the present that is what we are trying, yes.

Mr. Thompson: The question was, if the Court heard the question, was when he was an employee of the Company. Did the Court rule?

The Court: There is nothing before the Court.

Mr. Thompson: I understood he objected to my asking him when he entered the employ of the Company.

The Court: He wanted to define the situation.

Q. (By Mr. Thompson): When did you enter the employ of the Company? A. July 1, 1946.

Q. July 1?

A. July 1. I believe I was examined before that but I wanted some time because they were going to send me down to Yuma on a [186] construction job with Mr. Frank Fields.

Q. What was the nature of your employment when you first went to work for the Company?

(Testimony of Adolph J. Schnee.)

A. I believe it was called Apprentice Helper or Helper Signalman, I forget.

Q. Where did you start to work?

A. I started to work in the Tucson yard.

Q. And doing what?

A. Mostly doing odd jobs, cleaning switches and when I would be with Jack Young, inspecting crossings, making sure the signals were working, I would make sure the traffic wouldn't be interfered with; I would also stand at a distance to observe whether the lights were working or not.

Q. Over how long a period of time did you work with Mr. Young? Can you answer that, tell us how long you worked with Mr. Young?

A. Not very long. It wasn't more than three weeks and perhaps as little as two.

Q. What was the nature of the work you did with Mr. Young, would you say?

A. As I said before——

Q. That was the extent of it?

A. I don't remember whether we did or whether he showed me to build any batteries or to repair any mechanisms, anything like that. [187]

Q. Did you go about with him on a motor car during the time you were working with him?

A. I certainly did go with him, other than the time he would go in the office to make his report, he would be sure for me to watch the car or push it out of the way of trains if they took the siding we were in. Your Honor, may I say something?

(Testimony of Adolph J. Schnee.)

The Court: Yes.

The Witness: Before you questioned me about who I first went to work with at the Tucson yard.

Mr. Thompson: I think I asked you the Company.

The Witness: I overlooked the fact that Mr. Jack Young at that very date, July 1, prepared to go on his vacation and actually he was on his vacation, but he did come around to see if everything was going all right, since the young gentleman's name, a student or part-time student of the university, had taken his job as relief maintainer.

Q. What is his name?

A. Currie Field or Field Currie.

Q. Did you work with him?

A. I worked with him.

Q. What did you do with him. What character of work were you doing under his supervision?

A. One particular job we did was inspect the bonding; that would be the east end of the Tucson district, right into the yard. I walked every mile of it. It took a few days. [188]

Q. What was the extent of that district?

A. The extent?

Q. Yes. How far out from Tucson did it extend?

A. Quite a distance. I couldn't give you the mileage, sir.

Q. Did you ride on a motor car with Fields—is that his name?

A. Fields, Currie Fields.

Q. Did you ride on a motor car with Mr. Fields?

(Testimony of Adolph J. Schnee.)

A. Yes, sir.

Q. Did you ever operate the motor car with Mr. Fields? A. No, sir, I didn't.

Q. Never at any time? A. I did not.

Q. You can't recall you at any time had your hands on the drive mechanism of the car?

Mr. Gillen: That is a question different than driving the car.

Mr. Thompson: I asked him that.

Mr. Gillen: I object to the question as having been asked and answered, if that is the intention, if he wants to know now whether he had his hands on any part, that is another question.

Q. (By Mr. Thompson): Did you ever operate the drive mechanism of the car during the time you were with Mr. Fields?

Mr. Gillen: Objected to as having been asked and answered twice.

The Court: You may answer. [189]

A. I did not, and I may explain——

Mr. Gillen: Just answer it, please.

Q. (By Mr. Thompson): How long were you with Mr. Fields?

A. Until he was dismissed—that is correct.

Q. How long a time was that?

A. That I couldn't specifically say.

Q. Was it a matter of days or weeks or what was it?

A. It was more than a week, I am sure of that, and I don't think it was more than two weeks, perhaps eighteen days.

(Testimony of Adolph J. Schnee.)

Q. During the time you were with Mr. Fields did you ever build any batteries or did he build any batteries with you while you were with him?

A. I have a distinct recollection of helping him replace a battery, that is, he was to build it and he cut out, what we call cut out a circuit that was being used on a siding into a pipe company on a North Main Street crossing and used the batteries from that circuit to put in a battery cart they needed them.

Q. At any time during that experience did Mr. Field build any batteries? Did you see a battery built, as you use the term?

A. As you use the term, I seen him build batteries and he would attempt to explain to me the nature of it, that is, the electrical character of it, and so on; and I assisted him in carrying water and so forth. [190]

Q. Now, would they build batteries, Mr. Schnee?

A. Well——

Mr. Gillen: Of course counsel may have some purpose in mind. We have had it explained once. Whether this young man knows how to build a battery or not wouldn't have any effect on the liability.

The Court: You may answer.

A. What was the question?

Q. I asked you to tell me how you go about building a battery? What did you do, what were the steps?

(Testimony of Adolph J. Schnee.)

A. Of course I learned a lot more about it later on, but at that time I was in a daze because he tried to tell me many things about the operation of the signals and everything else. I should say what I remember at that particular time?

Q. No, at any time. How do you build a battery?

A. Well, later on I learned the regular procedure of building a battery as Mr. Ward explained it to you.

Q. That is the way they are built?

A. That is right.

Q. As I understand it the water is placed in the battery jar first after you have a clean jar, is that correct?

A. The first thing you do is dump the old electrolytic solution first.

Q. Yes; when the jar is clean you fill it with water?

A. You remove it and get all of the rest of the electrolytic [191] out of it and dump it, too. Then you put, I believe the caustic soda first. I think that would be the proper way. I hesitate to say which one is first.

Q. Is there a process where it becomes necessary to stir it so that you have a thoroughly saturated solution?

A. That is correct.

Q. What is used for that purpose?

A. You use what is commonly called a maintainer's paddle.

Q. That is wood, iron, or what is it usually composed of?

(Testimony of Adolph J. Schnee.)

A. It is generally, I believe, somewhat like the flat piece of thin wood you get off an orange crate, the side at the reenforced ends.

Q. It is all wood?

A. It generally is. I don't know what kind.

Q. When you stir a battery solution of that kind, did you ever observe it left any stain upon the stick?

A. I really—I had not been there long enough to observe just how the solution acts on a stick of wood.

Q. Calling your attention, you say “there.” What do you mean, hadn't been where long enough?

A. I mean at Willcox.

Q. Had you ever observed it in Tucson when you were helping these men?

A. Not particularly because it wouldn't be my place to do the actual work. I would assist in getting the various things, the [192] material together that goes to make it up.

Q. Did you ever see the man use the stick and stir the solution, did you ever see that during the time you were in Tucson? A. Yes, sir.

Q. How many times would you say you saw him do that?

A. I couldn't say how many times.

Q. More or less. Once?

A. Probably once.

Q. You think during all the time you worked in Tucson you only saw them build one battery?

(Testimony of Adolph J. Schnee.)

A. No, sir.

Q. All right. I will ask you the next question. During all the time you were in Tucson you only saw them stir the solution while they were building a battery one time?

A. I probably saw them do it more than once. I couldn't tell you the exact number of times. I believe it wasn't too many times because I wasn't coached to do those jobs.

Q. After it was over, did you take the tools back to the car?

A. I would take the water cans and I would take the little cartons and put them on the truck.

Q. Did you ever take the paddle back?

A. Generally—of course the maintainer makes a point that the paddle is dry; if it isn't they put it in something to put on the car.

Q. Did you ever do that? [193]

A. I might have.

Q. You don't recall now when the wood was placed in the caustic soda it made any discoloration?

A. I wouldn't know whether it did that or not immediately.

Q. Do you know whether or not it would do that ultimately? Did you ever see any paddles that had evidence of corrosive substance on them?

A. I would say it is reasonable for me to assume that.

The Court: Mr. Schnee, don't assume anything. If you saw any tell him, and if you didn't, tell him.

(Testimony of Adolph J. Schnee.)

A. No, I didn't.

Q. (By Mr. Thompson): During the time you were in Tucson and during the time you were at Willcox you had no occasion to observe whether or not that caustic solution had any particular effect upon the wood?

A. Later on when I worked in Willcox, Arizona, on my own, I of course observed, for one thing, if you had dirt on it, on the wood, of course it would come off the wood and come in with the solution. I was especially advised not to use a stick that was dirty, had paint on it or anything like that.

Q. So you did then, afterwards; while you were in Tucson you didn't at any time observe whether or not the caustic solution had any effect on wood?

A. Here in Tucson I had no occasion to pay particular attention to it. [194]

Q. Because of that you never observed any paddle or paid any attention to it?

A. I paid attention to the generality of the work. I wanted to put everything in my mind, therefore I lost a lot of facts of detail.

Q. When you got to Willcox you found out if you used a stick in this caustic solution it would have a cleansing effect, at least you found that out?

A. Yes.

Q. Did it look like a stick that had been in lye water? Have you ever seen a stick used in washing for a long time?

A. No, sir, we have a washing machine.

(Testimony of Adolph J. Schnee.)

Q. You don't know whether it resembles a stick that had been in a solution of lye, had a similar appearance?

A. I have had no occasion to work around lye.

Q. After you used this stick at Willcox during the time you were there, did it show more evidences of having been used in this caustic solution?

A. I don't think that, other than the observation I stated about a stick is the case, since I was extremely busy building many batteries on account of the district had been underworked, that is, no one had done any work.

Q. All right. Going back, when was the first time you ever operated one of these motor cars, Mr. Schnee?

A. I specifically recall the very day and Mr. Wallace, after [195] I had gotten my clothes together, got on the train, rush, rush; that particular day stood out in my mind as getting explicit instructions.

Q. You mean to say by that from the time you got on the train to go to Willcox you had never one time operated a motor car?

A. I had never at any time before that had control and sole responsibility of the motor car.

Q. I am not asking you that. I am asking you did you have occasion to operate the motor car, not when you were alone or with anyone; did you ever operate a motor car with Mr. Fields while he was directing you, or Mr. Young was riding with you or directing you?

(Testimony of Adolph J. Schnee.)

A. Not with Mr. Fields and not with Mr. Young especially, because he was kind of funny about it.

Q. Then do I understand you had never driven a motor car at all during the time you were in Tucson?

A. Not to the best of my knowledge.

Q. Just tell the Jury how these motor cars are operated. Explain it to them, Mr. Schnee.

A. From the point of starting out you have to get behind a car and push it and at the same time you take a sort of clamp in your left hand or right hand, whichever would be more convenient. If you were left-handed of course it would be a different story. Anyhow, this clamp has a point at each end, each side; when you press it together, I believe it completes [196] the circuit with the ignition system on this little engine and the throttle on it—well, I don't know how to term it—it is stationary. When you put it in any one position it stays there. I believe it has a clamp on the side that forces it to stay in place. Of course it has a part on it by which you can tighten the brakes. Then it has another lever, as I remember correctly, that tightens the belt. When you start out I suppose you could either—that is, after you had it started, you start from a running start and put your brake on; in the meanwhile holding on to this contact thing all the time, else your motor stops, and mount it. Then release your brake. Then of course operate your tension on a belt to gain momentum.

(Testimony of Adolph J. Schnee.)

Q. Your speed is more or less controlled by the tension of the belt, is it?

A. I don't know whether I was told it would be advisable or not.

Q. That is the speed of the engine that determines the speed of the car, is that right, ordinarily?

A. No, sir, I wouldn't say that, because the belt, you have an amount of slippage there I couldn't determine.

Q. It is driven by an engine, Mr. Schnee?

A. Yes, the power is derived from an engine.

Q. The belt, there is some slippage, but ordinarily the speed of the engine would determine the speed of the motor car; when you speed up the engine you speed up the car, is that correct? [197]

A. Generally speaking, yes.

Q. When was the first time you ever operated a motor car and where?

A. To my distinct recollection it was on the west side of the Willcox station.

Q. And who was with you at that time?

A. Mr. Wallace.

Q. He stayed with you how long?

A. I think that day he took me up there. He left me alone later on in the afternoon.

Q. What was the date you were taken up there?

A. I do not recall the exact date, but it was in the very beginning, the very beginning of August.

Q. What do you mean by the very beginning? Was it the first of August or was it the tenth?

(Testimony of Adolph J. Schnee.)

A. Well, it couldn't have been the tenth of August because part of my pay check in the two-week period was for helper or assistant signalman, one or the other, and the other part was made up as under signalman.

Q. So that it was then some four or five days after the beginning of August, is that your best recollection, or was it closer than that?

A. I would say about that time.

Q. Then you were working, then, as I understand, in Willcox from then until the time of your accident on August 29th? [198]

A. From then until August 29th.

Q. You were in Willcox some twenty-five or twenty-six days, something like that?

A. Just about.

Q. You were there at Willcox all that time, you didn't go anywhere else?

A. I think I got permission on a couple of Sundays to take off and be with my wife.

Q. But during all the working days for twenty-five or twenty-six days you were at Willcox?

A. That is right.

Q. What were your duties and what did you do while you were there those twenty-five or twenty-six days? Tell the Jury what you were doing.

A. My duties were, first of all it was impressed upon me to be sure not to take too many responsibilities on my shoulders in case of breakdowns, to overcome that, to get in touch with the signal main-

(Testimony of Adolph J. Schnee.)

tainer adjacent to this district, that would be in Bowie. I believe Mr. Wallace told me that would be the man he had informed me of, being a fresh man on the job.

Q. Those are things you are not to do, but what were you supposed to do?

A. I meant to say I got the report from him.

Q. What were you supposed to do as to the actual work?

A. As to the actual work was concerned, was especially observe [199] that all signals and signal lights were working after the trains had passed or while the trains were going over the track, and to rebuild batteries if they needed, and rebuilt especially the ones Mr. Wallace had pointed out to me and to especilaly keep the switches about the yard and at each siding clear of slack, dirt or anything else so it wouldn't interfere with the working of the signals.

Q. Were you ever told it was part of your duty to also observe the track and report anything that might appear to be of anything of danger on the track, or might interefere with the movement of trains or motor cars on the rails?

A. Especially I was told about the movement of trains.

Q. Was it part of your duty to report any obstruction, anything on the track that might be dangerous to the movement of the trains or motor cars?

A. I don't recall whether it was or not. I think it must have been.

(Testimony of Adolph J. Schnee.)

Q. Do you recall having taken an examination on safety rules prior to the time you went to Willcox, Mr. Schnee?

A. I recall being examined or was I called in front of somebody?

Q. However it was taken, were you required to answer some questions about the safety rules?

A. I was given a slip of paper with—I don't know how many questions on it, and I was told to take my time and to fill [200] it in at my own convenience or whenever I saw fit. It was entirely, well, like reading from a book and writing it down.

Q. You didn't take any trouble to find out what the safety rules were? Wasn't that the purpose of the examination, Mr. Schnee?

A. I don't know the purpose of the examination. I don't even know it was an examination. I did what I just told you.

Q. How long a time were you studying it over and preparing that examination from the safety rules?

A. I did it to the best of my ability and not in regards to the time because I was pressed for time in keeping up.

Q. All these various times, what period did you prepare it?

A. As a matter of fact, I put it in the mail the very morning, I believe, of the accident, that would be on the 29th.

Q. And in order to answer that you had to read the rule book, is that right, that was provided you?

(Testimony of Adolph J. Schnee.)

A. Yes, I had to read the rule book up to the point where I would find the answer in conjunction with the special question in this particular spot.

Q. At August 29th what had been your education?

A. Public education, I think it was just grammar school.

Q. And what grade did you reach?

A. Eighth grade.

Q. Did you have any special education after that?

A. When I was in the submarine service. [201]

Q. What training did you have there?

A. Diesel school, diesel electric, or diesel school and submarine school or both.

Q. Was that with the aid of books or purely instruction by word of mouth?

A. No, sir, by lectures mainly.

Q. No books in connection with it?

A. I believe the instructor would keep the daily processes of educating to himself. More or less he would give us notes, you see, just typewritten pages, one or two at a time.

Q. What had been your employment before you went to work for the Southern Pacific Company?

A. Directly before I went to work for the Southern Pacific lines I was employed, I was more or less self-employed, because the company I had worked for, a neon company on 905 South Fifth Street here in Tucson had the mortgage foreclosed; being un-

(Testimony of Adolph J. Schnee.)

employed I did various odd electrical jobs as electrician.

Q. You then had had some training as an electrician? A. Yes, sir.

Q. Prior to that time where did you work?

A. Prior to this self-employment?

Q. Yes.

A. I worked for this company again.

Q. That is in Tucson. Did you have any employment for any duration before you came to Tucson?

A. In New York City, sir.

Q. How long a time did you work there?

A. From January on until about July, 1944.

Q. You were at that time, at the time of the accident you were twenty-four years of age, were you not? A. Twenty-four or twenty-five.

Q. Saying you didn't know whether this was an examination or not, did you know what the purpose of having to answer these questions was; didn't you know, Mr. Schnee?

A. I think it was to facilitate or to more or less to accommodate your requirements.

Q. You knew it was so you would get some instructions in connection with the safety rules of the Company, didn't you, now, Mr. Schnee?

A. I did not, sir.

Q. You didn't know it was the purpose?

A. The reason I made that statement, sir, is because when I was hired I was given to understand I was to be employed in the construction gang at

(Testimony of Adolph J. Schnee.)

Yuma under Frank Fields and another man was put in my place immediately when I got a three-day detainment to tell my wife about it and arrange for being away from home. Now, when I was called up on this job, the reason I know it was unexpected was because I knew the man there that was working there.

Q. Mr. Schnee, you understood my question, did you not? [203] A. Yes, sir.

Q. I am asking you whether or not you did not know you were getting an examination so you would become familiar with the safety rules of the Southern Pacific Company? That was the purpose you were given the examination, so you would know what the rules provided, you knew that?

A. No, sir.

Q. You represented to the Company you studied the rule book, didn't you? A. I was told——

Q. Now, answer me. Did you represent to the Company you had studied the rule book? Did you give them a written statement to that effect? Do you know whether you did or not?

A. I did not give a written statement, I studied a book, no sir.

Q. You never at any time? A. No, sir.

(Defendant's Exhibit E marked for identification.)

Q. Mr. Schnee, did you in connection with your examination to the Company answer this question affirmatively: "Have you studied the book of rules

(Testimony of Adolph J. Schnee.)

dated November 14, 1943, for the maintenance of way and structures of the Southern Pacific Company?" And you answered: yes, you had, and signed your name to it.

A. Oh, yes, it is a question. I beg your pardon. I understood you to say did I make a written statement. I remember [204] signing my name, but I don't recall writing out had I represented reading the rules.

Q. But you did say you read the rules?

A. I signed my name to that.

Q. Did you read the rules?

A. I must have to get them in there.

The Court: Will you answer the gentleman. Did you read the rules or not?

A. Yes, sir.

The Court: All right.

Mr. Gillen: We will stipulate that is his examination, whatever the nature of it is.

Q. (By Mr. Thompson): Now, Mr. Schnee, what did you say you were employed for by the Southern Pacific Company? I understood you to say you were employed originally in construction work?

A. No, I was employed with the understanding especially I would be expected to leave town immediately for Yuma, Arizona.

Q. For what purpose? In connection with what type of operation?

The Court: He said with a construction gang.

A. Construction gang.

(Testimony of Adolph J. Schnee.)

Q. Isn't it a fact that you hired out in the signal department and that was what your application was for in the Company? [205]

A. Yes, sir, I had to go through that.

Q. That was what you hired out for was the signal department. You made application to become a signal employee? A. Yes, sir.

Q. Following your accident, Mr. Schnee, on August 29, 1946, did you make any written statements to anyone about the way that accident occurred?

Mr. Gillen: Can you fix a time, bracket the dates? When, ever since?

Q. (By Mr. Thompson): Ever since.

Mr. Gillen: Well, I think that is pretty general and remote. If he was referring to some time shortly after——

The Court: Cross-examine. He knows whether or not he made any written statement. I presume any time. Go ahead.

A. I remember being up in San Francisco in Mr. Gillen's office and making a statement to a Mr. Freeman, I believe.

Mr. Gillen: We will stipulate that was a deposition, if it please the Court.

(Defendant's Exhibit F marked for identification.)

Q. (By Mr. Thompson): Do you know Mr. M. O. Wallace? A. Yes, sir.

(Testimony of Adolph J. Schnee.)

Q. The gentleman who was here on the stand, I believe yesterday?

A. The gray-haired gentleman with the glasses, yes, sir. [206]

Q. He was the man that went with you to Willcox?
A. Yes, sir.

Q. And he was Assistant Signal Supervisor at that time?
A. That is right.

Q. Now, will you examine that document, please, Mr. Schnee, and see whether that is your signature that is appended to that?

A. It appears to be my signature. I don't quite write my name that way but it sure looks like it.

Mr. Thompson: We at this time, if it please the Court, offer this in evidence.

Mr. Gillen: I don't think it should be offered in evidence unless to determine the conditions. I note the date on that is August 30th, 1946, the day after the accident. Now, I think it should be established whether or not he recalls giving that statement to anybody, this man at that time.

The Court: You can ask him.

Mr. Gillen: Yes, Your Honor, I would like to. May I see that, please?

Q. (By Mr. Gillen): Mr. Schnee, do you have any recollection of anything that transpired with you or about you or around you on the date of August 30th, 1946, which would be the day after your accident?
A. Absolutely not.

(Testimony of Adolph J. Schnee.)

Q. When, if you can tell us, is the first time you recall [207] being fully and completely conscious of what was going on about you and being rational?

A. I don't recall any particular date, but I do recall the incident of having my bandages removed from my head. I don't know what date that was.

Q. You recall having the bandages removed from your head? A. That is right.

Q. My question is do you have any recollection of the first time you were fully conscious of what was going on about you and you were able to understand and converse rationally?

A. I believe it was at that time or immediately after, because I distinctly remember a nurse suggesting to my wife to get some sort of shampoo to use for patients. It isn't a wet shampoo, it comes in some other form. You don't have to use any water.

Q. Was that the day the bandage was taken off your head?

A. I think it was after that, because it was still sore.

Q. Now, do you have any recollection of Mr.— I don't see here who was supposed to have taken this statement.

Mr. Thompson: Doesn't it say Wallace?

Mr. Gillen: Wallace is a witness, but it doesn't say who took this statement.

(Testimony of Adolph J. Schnee.)

Mr. Thompson: He took the statement.

Mr. Gillen: Is this his handwriting?

Mr. Thompson: I presume so, that is my advice. [208] He took the statement.

Mr. Gillen: It isn't contended this is Schnee's handwriting?

Mr. Thompson: No.

Q. (By Mr. Gillen): Do you have any recollection of Mr. Wallace on the day following your accident, August 30th, 1946, writing out a statement of facts purportedly furnished by you on a Form 2611 bearing what you have identified as a signature appearing to be your signature?

A. I didn't follow your statement all the way.

(Question read.)

A. I get lost in there. I can't follow the whole statement.

Q. Do you remember anything that happened to you in St. Mary's Hospital in Tucson following this, any consciousness of anything happening to you?

A. No, sir.

Q. Are you conscious of having talked to anybody about the details of your accident, on that day?

A. Absolutely not.

Q. Are you conscious or have you any recollection of having particularly talked to Mr. M. O. Wallace and giving him a statement of the details of your accident on that day?

A. No, sir.

Q. Do you have any distinct recollection or any

(Testimony of Adolph J. Schnee.)

recollection [209] of reading what appears to have been typewritten in around your signature, "I have read and understand the foregoing statement and it is true and correct to the best of my knowledge and bleief." Do you recall anything of that sort being brought to your attention on the day following your accident?

A. No, sir, I don't recall ever seeing that type of form or number until this morning. I believe you mentioned it the first time.

Q. When was the first time after your accident you recall seeing Mr. Wallace or talking to him?

A. I do remember talking to him about my pay check being held up.

Q. How long was that after the accident, if you know?

A. I can't say the correct date. It was sometime after the period, I remember, the period after the doctor removed my bandages and stitches, I remember that, but before that I do not. I think it was after that. As a matter of fact, it must have been because my pay check came through long, long after it was due?

Q. When was it due?

A. I think it was due about six days or something, six days after the first or sixth.

Q. Six days after the first of September?

A. Yes, sir. I couldn't swear to it. I say I think. [210]

(Testimony of Adolph J. Schnee.)

Q. Do you recall talking to Mr. Wallace?

A. Yes, sir.

Q. About your pay check? A. Yes, sir.

Q. Do you recall ever giving Mr. Wallace a statement about the details of the accident?

A. No, sir, I don't recall anything other than trying to find out from him at a later date what happened.

Q. You tried to find out at some later time what happened?

A. I mean by later date a date after they did the work on my head.

Q. You mean after they removed the bandage?

A. Sometime after that. I remember trying to find out what happened after the accident, how I was hurt and in the condition I was in.

Mr. Gillen: May I hand this to the Clerk and ask the witness to be permitted to look at this signature?

The Court: If this was a release, which it hadn't that effect on this showing—I don't know whether the rules are the same on this exhibit or not. Anyhow, on the present offer I will reserve ruling. Are you through with your voir dire? You are going to make a further showing?

Mr. Gillen: I would make a further showing by other witnesses.

The Court: Wait, he is going to take the floor now. You [211] can come in again.

Mr. Gillen: Very well, sir.

(Testimony of Adolph J. Schnee.)

Mr. Thompson: I think it is premature; I should ask him whether or not he made the statement.

Mr. Gillen: Just a moment. May I interrupt. If counsel is going to ask him specific alleged or purported statements out of that statement, then I would ask permission of the Court to permit me to make a further showing.

The Court: I will take care of that. I don't think he is going to do that. Ask your question.

Mr. Thompson: If it please the Court, I was going to ask him if he made certain statements that appeared here.

Mr. Gillen: Then I ask permission to put on further testimony.

The Court: You mean of him?

Mr. Gillen: I ask permission to put on the testimony of witnesses that saw the plaintiff daily from the inception of his entrance into the hospital for a period during the time of his treatment.

The Court: Mr. Gillen, pardon me. On the present showing, Mr. Thompson, I don't feel disposed to make any reference to what is in the body of it, on the present showing.

Mr. Thompson: May we then, if at a later time the Court permits us to reintroduce it, may we recall the defendant for further cross-examination. [212]

The Court: Certainly.

Mr. Thompson: Will you mark these?

(Testimony of Adolph J. Schnee.)

(Defendant's Exhibit G marked for identification.)

Q. (By Mr. Thompson): Will you examine Defendant's Exhibit G for identification and state whether or not each of those two pages bear your signature, Mr. Schnee. A. "G"?

Q. That is "G."

A. This has got "G" on it.

Q. It is one document.

A. May I read this?

Q. Certainly. First, let me ask you, look at the signature and tell me whether it is your signature?

A. This looks like my signature.

Q. All right. Look on the next page, is that your signature?

A. Yes, sir, this looks like my signature. Can I read it now?

Mr. Gillen: May I have the date of those documents?

Mr. Thompson: "G" is September 3.

The Court: He has finished it, Mr. Thompson.

Q. (By Mr. Thompson): You said that was your signature there on those two pages, Mr. Schnee? A. Yes, sir.

Q. Do you recall making the statements that appear on that exhibit, Mr. Schnee? [213]

A. No, sir.

Q. You don't recall seeing Mr. Caldwell out there and talking to him about how the accident occurred on September 3? A. No, sir.

(Testimony of Adolph J. Schnee.)

Q. Have no recollection of it at all, is that right?

A. I remember after the incident I mentioned talking about it, trying to find out what happened. That is after this work or cleaning or removing the stitches, whatever it was, on my head.

Q. You don't know when that was, then?

A. I don't recall the date, no, sir.

(Defendant's Exhibit H marked for identification.)

Mr. Thompson: If it please the Court, at this time I would like permission of the Court, for the record at least, to examine the defendant with respect to specific statements. I presume the Court's ruling would be the same?

The Court: Yes.

Mr. Thompson: Would you hand him Defendant's Exhibit H?

Mr. Gillen: Is that the statement of the doctor?

Mr. Thompson: Statement of the doctor.

Q. Looking now at Defendant's Exhibit H, Mr. Schnee, and in the middle of that page tell me whether or not that is your signature?

A. It does, looks like it.

Q. What date does that bear? [214]

A. 8-29.

Q. What date does the statement bear?

A. January 28th.

The Court: What year?

A. It doesn't say the year.

Mr. Gillen: That is a rubber stamp that was put

(Testimony of Adolph J. Schnee.)

on there. It isn't established who put it on there. Some rubber stamp put on the side of the paper.

Mr. Thompson: Calling your attention to the first line there, Mr. Schnee, that purports to be dated 10-3-46, does it not?

A. 10-3-46, that is right, sir.

Q. Now, on October 3, 1946, did you make the statements to M. Stewart that appear above your signature? Did you give her that information and sign that report? A. October 3?

Q. October 3, 1946.

Mr. Gillen: Identify M. Stewart.

Mr. Thompson: M. Stewart being the clerk, one of the clerks at the Southern Pacific Hospital.

A. At the Southern Pacific Hospital?

Q. Here in Tucson, or sanitorium, I guess they call it.

A. I never made such a statement. I don't recall ever seeing such a paper like that in the hospital.

Mr. Thompson: If it please the Court, now this being [215] dated October 3, 1946, I want to ask the witness specifically about this statement, specifically when he made it.

The Court: My feeling is you had better put on Miss Stewart and Mr. Wallace, whoever it was, and make your offer in connection with their testimony.

Mr. Thompson: Fine. If the Court please, at this time, with permission of the Court, I would like leave to withdraw the witness on his cross-examination and call Mr. Caldwell, one of the

parties named on the statement, if it please the Court.

The Court: Do you want to examine the plaintiff to this point?

Mr. Gillen: No, Your Honor.

JOHN D. CALDWELL

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name, please.

A. John D. Caldwell.

Q. Where do you reside, Mr. Caldwell?

A. Mill Valley, California.

Q. What is your occupation?

A. I am a claims agent.

Q. For whom? [216]

A. Southern Pacific Railroad.

Q. How long have you been so employed?

A. I was employed in February, 1942, and I was in the Army for three years and I went back to work in the same position—let's see, it would be November, 1945.

Q. Where were you working in August, 1946, Mr. Caldwell?

A. I was working in Tucson, Arizona.

Mr. Thompson: It is perfectly proper to elicit all of the testimony I want to bring out from this witness, not only with respect to this document but complete with him entirely?

(Testimony of John D. Caldwell.)

The Court: Let's see how it develops, Mr. Thompson.

Q. (By Mr. Thompson): You were working here in August, 1946? A. I was.

Q. Was there reported to you an accident which had been sustained by the plaintiff, Adolph Schnee?

A. There was.

Q. Are you acquainted with Mr. Schnee?

A. I am.

Q. When did you first become acquainted with him? A. The date?

Q. Yes.

A. I don't know the exact date. I first saw him, I would say, some three or four or five days after the accident.

Q. Is that the first time you had met him?

A. That is the first time. [217]

Q. At any time. At that time where did you see him?

A. I saw him at St. Mary's Hospital.

Q. Do you recall whereabouts in the hospital?

A. Yes, it was in the orthopedic ward on the second floor in a room I occupied about a month later.

Q. Did you have any discussions with him at that time? A. I did.

Q. Were there any other persons present?

A. At the time the statement was discussed, that is the information was taken and the statement was written, no. At the time I read the statement to him and he read it and signed it, yes.

(Testimony of John D. Caldwell.)

Mr. Gillen: Just a moment. I move that the portion of the answer "and he read it" be stricken as an opinion and conclusion.

The Court: Denied.

Q. (By Mr. Thompson): What time of day was it when you first saw Mr. Schnee.

The Court: Which exhibit are you talking about? Give the number.

Mr. Thompson: This is Defendant's Exhibit G for identification.

Q. When you first saw Mr. Schnee, on the date the first time you saw him, what time was it?

A. I would say between 10:30 and 11:00 o'clock in the [218] morning.

Q. And at that time had you had any information about the details of this accident that had been sustained by Mr. Schnee? A. I had not.

Q. What was the extent of your knowledge of the facts surrounding the accident when you went out there, if any?

A. It is my recollection I had either received a call from the superintendent's office or had received a flash report stating that Mr. Schnee had been injured in a motor car accident and that was delayed somewhat after the accident. Maybe within a day or two after the accident I went out to see him.

Q. Did you go out to see him in connection with your duties in the claims department of the Southern Pacific? A. I did.

(Testimony of John D. Caldwell.)

Q. Where was Mr. Schnee in respect to the room? Was he in his bed in the hospital?

A. He was.

Q. I will ask you whether or not you introduced yourself to him? A. I did.

Q. How long were you there at that time, talking with Mr. Schnee?

A. I would say between an hour and an hour and a quarter. [219]

Q. What transpired? Just tell the Jury in your own words what he said, what you said and what was done there at that time.

A. You want me to tell the whole story?

Mr. Gillen: Just a moment. I would like to have an opportunity to examine this witness on voir dire.

The Court: You may.

Q. (By Mr. Gillen): Mr. Caldwell, what was the appearance of Mr. Schnee when you went into the room to see him?

A. He appeared to be alert, without pain, but he had numerous abrasions on him. I don't recall whether he was in traction or not. Other than that, I believe now—I wouldn't swear because it is some time ago, but if my recollection is correct I believe his head was shaved.

Q. His head was shaved?

A. It has been four years ago, nearly, but that is my best recollection. See, I had considerable personal contact with Mr. Schnee about a month

(Testimony of John D. Caldwell.)

and a half after this when I was in the hospital with a fractured hip and pelvis and he was in a room adjoining me and would come over and see me quite often. I don't know whether his head was shaved at that time or maybe a month and a half after.

Q. You can't tell us just how he looked at that time? A. Yes.

Q. Was his head shaved or wasn't it on that first visit? [220]

A. I would say my best recollection is that his head was probably shaved.

Q. His head was probably shaved?

A. Yes.

Q. You don't know, do you, Mr. Caldwell?

A. No, I don't know so far as his head.

Q. Was he in traction, was there any extremity of his in traction?

A. I don't believe it was.

Q. Was there any extremity of his you observed in bandages?

A. I believe his knee was in bandages.

Q. You saw his knee?

A. I believe it was. I believe I did.

Q. Do you remember the circumstances under which you saw his knee?

A. I believe it was warm and possibly the bed covers were off his limb.

Q. It was warm and the bed covers were off his limb? A. That is right.

(Testimony of John D. Caldwell.)

Q. That is your recollection?

A. That is right.

Q. Is that the only extremity you observed that had any bandages on?

A. I believe his right foot was bandaged also.

Q. What kind of bandage? [221]

A. I am not a doctor. I cannot describe the type bandage.

Q. Can you describe what it looked like, particularly when you had some experience.

A. I don't know the name of the bandage.

Q. I am not asking you that.

A. It was a gauze bandage on his foot.

Q. Do you have a distinct recollection of that?

A. No, I don't have a distinct recollection.

Q. How about his hands?

A. I don't recall whether his hands were bandaged or not.

Q. How about his head?

A. As I said, I believe his head was shaven and may possibly have had a bandage there.

Q. Is that the best description you can give?

A. That is right.

Q. Now, did you discuss with him any treatment he was receiving?

A. I asked him if he was receiving good treatment; he said he was.

Q. He was very alert and out of pain?

A. That is right.

Q. Did he tell you he was out of pain?

(Testimony of John D. Caldwell.)

A. He did.

Q. Said he had no pain at all? [222]

A. He said he was feeling good.

Q. You have a distinct recollection of that?

A. I do.

Q. Mr. Caldwell, don't you know as a matter of fact that this man on the 29th day of August, 1946, immediately after his arrival in the hospital, was found to have a fractured skull and a large wound that exposed the skull on his scalp which had to be sutured and his right leg was swathed in bandages; that there was a cast placed on his right hand; that there was a full leg cast placed on his right leg—I beg your pardon, on his left hand; there was a full leg cast placed on his right leg and a full leg cast placed on his left leg, and that was the condition he was in on August 30th. He was under morphine and other narcotics; he was irrational for a period of three weeks.

A. No, sir. As a matter of fact, I checked with the nurse before I went there and ask if he had any morphine, narcotics or sedative, and she said positively not.

Q. How many times did you visit him on that occasion? A. I don't recall.

Q. Don't you recall for a period he was in an oxygen tent? A. No, sir.

Q. For a period of a week he was in an oxygen tent? A. I do not know that.

Q. If I showed you the hospital records wouldn't it refresh [223] your recollection?

(Testimony of John D. Caldwell.)

A. It probably wouldn't. I am not a doctor.

Q. You know what an oxygen tent is?

A. I think I do.

Q. It is an isinglass affair and oxygen pours in enough to keep him alive, you know that?

A. Yes, sir.

Q. You have been around hospitals as a claims man?

A. Not so much.

Q. You are in and out of the hospital, the Southern Pacific Hospital in San Francisco?

A. I have not been in the Southern Pacific General Hospital except to go out and visit a doctor.

Q. You do know what an oxygen tent looks like?

A. Yes, sir.

Q. Do you know what an oxygen mask looks like?

A. I don't know that I saw an oxygen mask.

Q. Did you ever see this man in an oxygen tent or oxygen mask?

A. I never did.

Q. You never did?

A. No, sir.

Mr. Gillen: I have concluded my examination on voir dire of this witness, but before this witness is permitted to testify to any details or testify, I ask your Honor's [224] permission to put on other testimony in support of my contention which I will be glad to incorporate in an offer of proof under any conditions your Honor suggests.

The Court: You may continue. The request is denied. Continue your examination.

Q. (By Mr. Thompson): Now, at this time,

(Testimony of John D. Caldwell.)

Mr. Caldwell, calling your attention to the first date you saw Mr. Schnee, and by referring to the Defendant's Exhibit G, can you tell me what date that was?

A. It was taken on September 3, 1936.

Q. You say you were there and talked with him for some period of time in the forenoon, is that correct? A. That is right.

Q. The subject of that conversation was principally the accident and how it occurred?

A. I asked him of certain events leading up to and including the accident.

Q. And he answered you? Did he give you the answers? A. He did.

Q. I notice that the document Defendant's Exhibit G, is typewritten. Where was it typewritten and how was it taken?

A. I took the statement in long hand. I am not too legible a writer; I went home for lunch at noon time and my wife, I gave her the longhand draft and she can read my writing and she typed out this original statement here and [225] returned to the hospital, possibly one o'clock, about that time and I went into Mr. Schnee again—I call him "Johnny"—went into his room and asked the nurse to come in with me, the supervisor. She came in and I read the statement to him and I gave it to Mr. Schnee and he read it. I asked him if it was true and correct and he said it was and he signed it, both copies of it.

(Testimony of John D. Caldwell.)

Q. Did the nurse who was there——

A. She witnessed it and both copies, I believe, yes.

Q. And he told you at that time that it was true and correct, is that correct?

A. That is just right.

Q. Calling your attention to the scene of the accident, at any time after September 3rd did you have any occasion to make any further investigation with respect to this particular accident?

A. I did.

Q. What was the nature of that investigation, Mr. Caldwell.

A. I went to Wilcox and contacted the Marshal there and another man—I don't recall his name right off, I believe he was a miner by occupation. I took statements from both of those men regarding what they observed at the scene of the accident afterwards.

Q. Calling your attention, do you remember the Marshal's name? [226]

A. Was it Dick somebody. He is a one-armed gentleman, has one hand, I should say.

Q. You have seen him here in the courtroom?

A. That is right.

Q. And the other man, do you recall what his name was?

A. I would remember it if it was given me, but I can't recall right now.

Q. Then did you take any other further state-

(Testimony of John D. Caldwell.)

ments in connection with that particular accident, that you recall? A. Yes, I did.

Q. What other statements?

A. I took a statement from the signalman.

Q. And then at any time later did you have any occasion to observe or find the car which had been involved in this accident? A. I did.

Q. Did you locate the particular car?

A. Yes. It had a tag on it that said on the tag——

Q. Just a moment. You located the car?

A. Yes, sir.

Q. Where?

A. It was down at the motor car repair shops in Tucson.

Q. I will ask you whether or not under your direction any photographs were taken of that car by anyone under your direction? [227]

A. There were.

Q. Who took the photographs?

A. I believe Mr. Glasser.

Q. I hand you Plaintiff's Exhibits 1, 2 and 3 and ask you if you have seen those photographs before?

A. Yes, sir.

Q. And do you know where they were taken, those pictures?

A. They were taken out by the motor car repair shops in Tucson.

Q. I will ask you to state whether or not those are pictures of the motor car which was involved in the accident involving Mr. Schnee?

(Testimony of John D. Caldwell.)

A. They are.

Q. Calling your attention to Defendant's Exhibit B, I ask you to examine those—one other question about the 1, 2, 3, are those fair representations of the car as it appeared at the time the photographs were taken? A. They are.

Q. Then looking at Defendant's Exhibit B, do you recognize those? A. Yes, sir.

Q. You have seen them before?

A. Yes, sir.

Q. What do they represent, portray?

Mr. Gillen: Of course the pictures speak for themselves, [228] Your Honor.

Mr. Thompson: I don't think they have been admitted in evidence yet.

The Court: Answer the question.

The Witness: What was the question?

The Court: What they represent.

A. They represent the motor car Mr. Schnee was riding on at the time of the accident.

Q. Do you recall when they were taken?

Mr. Gillen: I move it be stricken. There is no foundation to show he knows the motor car Mr. Schnee was riding on at the time of the accident. There is some testimony here he received some hearsay concerning what was the motor car.

The Court: Motion denied.

The Witness: I didn't get the question.

(Last question read.)

(Testimony of John D. Caldwell.)

A. If my recollection is correct I believe these were taken some time later than the other pictures. I believe the first set you showed me was taken along in September and these in October. I don't know the exact date.

Q. They were all taken at the motor repair shop, is that correct? A. That is correct.

Q. Calling your attention to Defendant's Exhibit D-1 to D-5 for identification, I will ask you if you have seen those? [229] You have seen those before? A. I have.

Q. They represent what?

A. They represent the car Mr. Schnee was riding at the time the accident occurred.

Mr. Gillen: Same objection, if it please the Court, same motion.

The Court: Objection overruled. Now the question.

A. (Continuing): Taken near the motor repair shop in Tucson.

Q. In connection with that exhibit, I notice there is a stick shown in the pictures. What was that picture, if you know?

A. I don't know exactly what the stick was.

Mr. Thompson: Let me see those again just for a moment.

Q. Calling your attention to D-1 to D-5, I notice there is a stick shown there in various places in the photograph alongside the motor car.

A. A yard stick, you mean?

(Testimony of John D. Caldwell.)

Q. Was it a regular yard stick?

A. It was.

Q. Do you know who was holding the yard stick when it was taken? A. I was.

Mr. Thompson: I believe that is all. [230]

Cross-Examination

By Mr. Gillen:

Q. Now, have you got your original notes on the statement you claim you took from the plaintiff, Schnee, at St. Mary's Hospital in Tucson?

A. It is right here. Is that what you refer to? The original statement is right here.

Q. The original notes.

A. I didn't make any notes, all I had was this same statement written out in longhand.

Q. That is what I am talking about.

A. I don't have those, no, sir.

Q. What did you do with them?

A. I imagine my wife destroyed them at home. I didn't see them again, so far as I recollect.

Q. You didn't retain the notes?

A. I did not.

Q. You claim you asked some questions and received some answers from Mr. Schnee at the hospital, and that you wrote them down and took them home because your handwriting is so poor and only your wife understands it; you had her retype them?

The Court: He didn't say only his wife.

A. I didn't say that. I went up to Mr. Schnee

(Testimony of John D. Caldwell.)

and interviewed him and he told me the story, how the accident occurred, [231] and I wrote it down. It wasn't a question and answer proposition. He told me and I wrote it down.

Q. You wrote a summary of it in your own words? A. I wrote what he told me down.

Q. You wrote a summary of it in your own words?

A. I wrote what he told me down in the statement in my words.

Q. That is what I say, a summary of what he told you. A. If you want to call it that.

Q. What you claim he told you. Did you take a statement from Mr. Dick Hallmark the City Marshal of Willcox? A. I did.

Q. Did you do that in the same manner?

A. I did.

Q. Did you take your longhand and have it re-typed? A. I did not.

Q. Was Mr. Hallmark able to read your writing?

A. I presume he could. He signed it and said he could.

Q. As a matter of fact, Mr. Hallmark took a statement away from you you had written out in your own words and tore it up and threw it away, isn't that a fact? A. He did not.

Q. Do you deny that? A. I do.

Q. Isn't it a fact that you wrote into the statement that [232] you were taking from Mr. Hallmark that the motor car, when Mr. Hallmark

(Testimony of John D. Caldwell.)

arrived at the scene of the accident, was headed railroad west instead of railroad east, and that he told you when you read that that he didn't say that; that he took the paper out of your hand and tore it up and said, "If you want a statement from me, you put down what I told you, not what you want to put down."

A. That is not true.

Q. You deny that happened? A. I do.

Q. Who was present when you took the statement from Mr. Hallmark?

A. Just Mr. Hallmark and myself.

Q. Do you have the statement Mr. Hallmark made? A. I don't have it, no.

Q. Do you have it, counsel?

Mr. Thompson: Yes.

The Court: You can read that after you recess, and go ahead with this witness, Mr. Gillen.

Mr. Gillen: All right, Your Honor.

Q. So there can be no question about it, you deny such an incident as I related between you and Mr. Hallmark ever took place?

A. That is correct.

Q. We would like for you to show, or have this shown to the [233] witness and ask him if this is in his handwriting with the exception of the purported signature.

Mr. Henderson: I believe it should be marked for identification, Your Honor.

The Court: You are willing to have your number?

(Testimony of John D. Caldwell.)

Mr. Gillen: I haven't had an opportunity to read it yet. I never claim anything until I read it.

The Court: All right. Give it to the defendant.

(Defendant's Exhibit "I" marked for identification.)

The Court: He wants to know if that is your handwriting? A. It is, sir.

Q. (By Mr. Gillen): It is my understanding, Mr. Caldwell, they permitted you in the hospital to visit with Mr. Schnee for between an hour and an hour and a quarter in the forenoon of the day which I believe is identified tentatively as September 5, 1946? A. Was it the 5th?

Q. Is it the 5th or 3rd? I am not trying to confuse you on the date. September 3, 1946. That would be five days after the accident, is that correct? A. That is correct.

Q. How long did you stay with him in the afternoon when you brought back the notes you immediately typed to replace your handwriting?

A. Possibly fifteen or twenty minutes, maybe twenty minutes. [234]

Q. Did you see Mrs. Schnee, either in the forenoon or afternoon of that day?

A. I don't recall.

Q. You are acquainted with Mrs. Schnee, are you not? A. I am.

Q. You don't recall seeing her in the period from an hour to an hour and a quarter that morning? A. I don't recall.

(Testimony of John D. Caldwell.)

Q. Do you recall a man in the same room on that day, a patient, I mean?

A. There may have been. There were two beds in the room. I don't recall whether there was a man there or not.

Q. You paid a number of visits back to Mr. Schnee subsequent to September 3rd?

A. I didn't say that.

Q. Did you?

A. I probably saw him again, I don't know how many times I saw him after that.

Q. Do you remember paying him a visit about three weeks after the accident? Where you made some arrangement for him to draw some advance of money?

A. I don't remember the date. I know several advances were made.

Q. Do you remember when you talked to him about the first advance? [235]

A. I don't remember the date, no, sir.

Q. As a matter of fact, isn't that the first time you found Mr. Schnee rational and able to talk to you?

A. It was not.

Q. Did you ever visit with him when Dr. Francis was present?

A. I may have.

Q. You don't remember?

A. I wouldn't say definitely. I talked to Mr. Schnee almost every day for a period of almost over a month and Dr. Francis would come in and see me and also Mr. Schnee.

(Testimony of John D. Caldwell.)

Q. I am not talking about after you were hurt yourself, but while you were actively engaged as a claims man before you got hurt.

A. I don't recall.

Q. Was there any reason, Mr. Caldwell, why you took your notes home to your wife and had them typed, other than the explanation you have given us?

A. There is one other possible explanation.

Q. I don't want any possible explanation, I want your own explanation.

A. It would save time. On these statements I am required to make a copy of the original and my wife in this particular case would put in carbon papers and save time of copying the original statement again. [236]

Q. Which was it, to save time or because your handwriting was bad?

A. It was principally because my handwriting was bad.

Q. You call your handwriting hard to read, is that correct? A. On that particular day.

Q. Was there something wrong that day that made your hand a little bit difficult in the forenoon of that day, made it hard for you to write?

A. Oftentimes when you are taking a statement and a person changes their story or goes and makes changes in it and you have to cross out, it makes it illegible and ordinarily I am not too good a writer.

(Testimony of John D. Caldwell.)

Q. Were there any changes you recall Mr. Schnee made in his story or you made in his story on that date?

A. I don't recall whether or not there were now. It isn't unusual, I will say that, that changes are made.

Q. Now, you say Mr. Schnee was quite alert and bright to everything going on about him and was in no pain and so expressed himself?

A. That is right.

Q. Did he rattle off a story in good sequence or was it a story you had to get out of him by plying with questions?

A. You would have to question him.

Q. What was the story on that day?

A. I said you would have to question him, ask him questions [237] and he would give answers and part of the time he would go ahead and continue on without any questions.

Q. Did it take you from an hour to an hour and a quarter to get that short statement out of him?

A. It did.

Q. Yet you say he was alert and bright?

A. That is right.

Q. Alert to what was going on about him and not in any pain?

A. That is correct.

Q. You didn't attempt to put the statement down in question and answer form?

A. No, sir.

Q. Now, on the afternoon when you returned

(Testimony of John D. Caldwell.)

with the typewritten statement, did you bring with you your original notes?

A. I don't recall. I am quite certain as I think it over I left them at home.

Q. You didn't bring the typewritten statement and say, "Here, Johnny, here is the typewritten statement my wife has done nicely and neatly, so you can compare it with what you said this morning; here are the original notes I made; read them both and if they are all right, sign it?"

A. No, sir. I read him the statement and he agreed that was exactly how the accident occurred and then he read it over [238] himself and agreed to it.

Q. He read it over himself? A. He did.

Q. Did he appear as alert and free of pain in the afternoon as he did in the morning?

A. He did.

Q. Tell you he was feeling fine?

A. Feeling good.

Q. Looked good? A. He did.

Q. Did you take any notice of what the condition of his head was that afternoon or in the afternoon?

A. No, I don't recall.

Q. You don't recall whether it was bandaged or not? A. I don't recall.

Q. Did you ever go to the scene of the accident?

A. I did.

Q. When?

A. The same date I took this statement from Mr. Hallmark, is that his name?

(Testimony of John D. Caldwell.)

Q. Yes, Dick Hallmark; that was September 25, 1946, is that the first day you went out to the scene of the accident? A. It was.

Q. You say that when you first saw the car you didn't know of your own knowledge whether that was the car involved in [239] the accident or not?

A. There was a tag——

Q. My question is, you didn't know of your own knowledge whether that was the car involved in the accident?

A. I didn't witness the accident, so I couldn't say as to that.

Q. How soon after the date of the accident did you first see the car?

A. Possibly, probably six or seven days afterwards, something like that.

Q. Do you recall the date those photographs were taken? A. I don't remember the date, no.

Q. Did you first see the car in Tucson or in the other town? A. In Tucson.

Q. You think it was six or seven days after the accident? A. It could have been more.

Q. The only reason you rely on the belief it was the car involved in the accident was this: There was a tag on it? A. That is correct.

Q. That was the evidence in the case and your investigation, is that correct?

A. If my recollection serves me correctly, the tag said, "Schnee motor car," "Schnee accident," something of that nature.

(Testimony of John D. Caldwell.)

Q. That was so tagged at your direction, isn't that right? [240]

A. No, I didn't know it was tagged until I saw it there.

Q. In the course of your investigation you went to find out where the car was, take a look at it and take some photographs of it, is that correct?

A. That is right.

Q. Whom did you apply to for the purpose of getting to the car?

A. I just went down and looked at it.

Q. Who informed you it was there?

A. I don't recall who it was.

Q. You had some information at that time, did you not, the car had been derailed, isn't that correct?

A. I don't believe I did. I don't know whether I received any information at that time or not.

Q. Didn't you see the car after you claim you took the statement from Mr. Schnee?

A. After I took Mr. Schnee's statement I believe I did.

Q. You had some information then, didn't you?

A. After I took his statement, yes.

Q. Did you also inquire, when you went to see the car and take the photographs of it, did you inquire for the grade stake that was involved in the accident? A. I did.

Q. Of whom did you inquire?

A. I don't remember who it was. [241]

(Testimony of John D. Caldwell.)

Q. You considered that an important piece of evidence, didn't you? A. Yes.

Q. You don't know who you asked?

A. No. There were a number of people. In all probability it was the foreman.

Q. You didn't call up and say, "Here I have the motor car, but where is that stake?" A. No.

Q. Who was the foreman on the job?

A. I don't know his name.

Q. Did you make any inquiries at any time from anybody as to where the stake was, the grade stake was?

A. I believe I made an inquiry from Mr. Jacobson or Mr. Lyons, I don't know which one, and asked them.

Q. And what did you learn?

A. I learned from them it wasn't saved, it was thrown away.

Q. Who said he threw it away?

A. It was either Mr. Jacobson or Mr. Lyons.

Q. Did you write a report on that?

A. No, I didn't.

Q. You have to write a report to the claims chief, don't you, on the progress of your investigation?

A. Not until the file is complete.

Q. When the file was complete did you ever write a report [242] that one of the most valuable pieces of evidence, to wit, a surveyor's stake, wasn't available and could not be located by you?

A. I don't recall whether I included that in my

(Testimony of John D. Caldwell.)

report or not or if the report was written. I don't remember writing a report.

The Court: We will resume at 9:30 a.m., gentlemen.

(Whereupon a recess was taken at 5:00 o'clock p.m. until 9:30 o'clock a.m., March 3, 1950.)

Q. (By Mr. Gillen): Now, Mr. Caldwell, you have been transferred from the Arizona territory for the Southern Pacific up to the San Francisco territory, is that correct? A. That is correct.

Q. When did that transfer take effect?

A. March 1, 1949.

Q. March 1, 1949. And under what circumstances were you transferred out of Arizona by the Southern Pacific to the San Francisco territory?

A. Well, my superior, Mr. Lowe, the general claims agent, wanted to give me more experience, or some experience in the general office. That was the reason of the transfer.

Q. Was that the reason given you?

A. That is right.

Q. No other reason? A. No, sir.

Q. Were you brought from San Francisco to testify in this [243] case? A. That is correct.

Q. How many cases have you testified in for the Southern Pacific Company?

A. This is my first one.

Q. This is your first one?

A. This is the only one.

(Testimony of John D. Caldwell.)

Q. The only time you ever testified?

A. That is correct.

Q. Isn't it a fact you testified you were returning from Arizona to New York to testify in the case of Edward Sullivan against the Southern Pacific Company?

A. I did not testify in New York.

Q. You are sure you didn't testify in New York?

A. I am positive.

Q. You were taken from Arizona to New York to testify? A. No, sir.

Q. You didn't go to New York in the Sullivan case? A. I didn't go there to testify.

Q. And you didn't testify? A. I did not.

Q. This is the first time you have testified in any case? A. That is right.

Q. Now, I understand that while Mr. Schnee was still in the hospital under care for the various injuries that he had, [244] an automobile accident befell you and your wife, is that correct?

A. When he was in what hospital?

Q. While he was still in the hospital under care?

A. I believe that is correct.

Q. Now, as a matter of fact, so that we may have it clear in our minds, the Southern Pacific Company maintains a hospital here that primarily specializes in tubercular cases, is that right, and that is known as the Southern Pacific Sanitorium?

A. I believe they have. About half the hospital is devoted to tubercular cases and perhaps half of the hospital devoted to general patients.

(Testimony of John D. Caldwell.)

Q. Yes. And it is within your knowledge, is it not, that lack of surgical facilities and serious surgical cases are usually sent to St. Mary's Hospital, is that correct?

A. At that time I believe they didn't have a traction bed. That is the reason I was sent there.

Q. At that time they didn't have a surgery, they just had a minor surgery and dressing room, is that right?

A. I wouldn't know about that.

Q. It is within your knowledge, however, that serious surgical cases or orthopedic cases were sent to St. Mary's Hospital where they had general surgical facilities?

A. I believe that is correct. [245]

Q. And particularly orthopedic cases or bone cases? A. Yes.

Q. You recall, do you not, that after Mr. Schnee had been in the St. Mary's Hospital for some time and had undergone several operations he was then transferred to the Southern Pacific Sanitorium, is that correct?

A. I don't know how many operations he had undergone.

Q. I didn't say——

A. You said several operations.

Q. You know he had an open reduction on his left hand and bones wired together in his left hand, metacarpal bones.

A. I did not know that.

(Testimony of John D. Caldwell.)

Q. You were investigating the case?

A. It was nearly four years ago, and I don't recall all the injuries he had at this time.

Q. You don't recall even how he looked the first time you saw him?

A. Yes, to a certain degree I do.

Q. You do recall in minute detail what he had to say to you and what you had to say to him?

A. That is correct.

Q. You do recall the first time you saw him five days after the accident he was completely free of pain and completely alert of everything?

A. That is correct, because I make it a point when I take [246] a statement that they are alert and free from pain.

Q. Did you ever tell anybody he was still out of his head when you went out there on the 3rd of September, 1946? A. Positively not.

Q. You are sure of that? A. I am.

Q. Did you see any other railroad man who was in the hospital at that time?

A. In the St. Mary's Hospital?

Q. Yes. A. I don't recall seeing anyone.

Q. Now think? A. What day?

Q. September 3, 1946, did you see any other railroad man who was then in the hospital?

A. I don't recall seeing any railroad man.

Q. Did you see any other railroad man to whom you confided you had a man all smashed up and you stated was still out of his head? A. I did not.

(Testimony of John D. Caldwell.)

Q. Referring to the Plaintiff Schnee; you don't recall that? A. I said I didn't.

Q. You don't recall you saw another railroad man there that day? A. Yes. [247]

Q. Isn't it a fact that it came to your attention Schnee had one operation there consisting of the open reduction of the fractures of the left hand?

A. I said I didn't recall that he had that.

Q. Isn't it within your knowledge, within a month after he was in the hospital, during September he had another operation consisting of an open reduction of the fracture of the patella?

A. I remember that, sir.

Q. Where the lower part of the patella was cut out and the fascia and tendons sewn to the top part of the patella?

A. I believe he was still recovering from that when I was a patient in the hospital.

Q. Isn't it within your knowledge there were also surgical procedures used on the open wound in his ankle and compound comminuted fractures of the ankle of the right foot? A. Yes, sir.

Q. Isn't it within your knowledge that his scalp was sutured in a number of places where it had been laid open to expose the skull?

A. As I recall, his scalp, his hair was shaved and bandaged. I don't recall.

Q. You remember he had a bandage on now, do you?

A. I believe it was shaved and my recollection is there being a bandage. [248]

(Testimony of John D. Caldwell.)

Q. What refreshed your recollection since yesterday that he had a bandage?

A. I believe yesterday didn't I say he had a bandage on?

Q. No, you didn't. You said he had a bandage on his knee yesterday and you recalled his head was shaved.

A. And he had a bandage on.

Q. You did not recall he had a cast on his hand and a bandage on his knee.

Mr. Thompson: I submit that is improper cross-examination, argumentative.

Mr. Gillen: Perhaps. I was asking the witness if he didn't testify to that?

Q. Let me ask you, after this procedure had been gone through with on Mr. Schnee and after about six weeks or two months if he wasn't transferred from St. Mary's Hospital to the Southern Pacific Hospital and shortly after he was transferred, the accident befell you and you went to St. Mary's and occupied, by coincidence, the same bed Schnee had been in.

A. I know I occupied the same bed he had occupied. I don't recall when he left the St. Mary's Hospital.

Q. Isn't it within your knowledge that one week after he was transferred to the Southern Pacific Hospital that because of his condition he was transferred back to St. Mary's Hospital while you were a patient there? [249]

(Testimony of John D. Caldwell.)

A. He was transferred back there, I know that.

Q. It is within your knowledge, is it not, that certain surgical procedure was undergone there?

A. I believe that is correct.

Q. Then after some considerable period of time had passed he was well enough to visit you in your room, isn't that so?

A. Yes, also my wife, who was also a patient in the hospital as a result of this accident.

Q. Yes, I understand that it is a fact also, is it not, that Mrs. Schnee visited her husband daily and she did various errands for you and your wife while you were in the hospital?

A. I don't believe she did, no, sir.

Q. You don't believe she did?

A. I don't recall of any. It has been nearly four years ago. She may have made a telephone call.

Q. Do you remember her going out and making minor purchases for you and your wife?

A. I don't recall.

Q. Do you remember her delivering messages back and forth between you when you were in different parts of the hospital?

A. I believe she did that.

Q. Do you remember her attending personal matters for you about your home?

A. No, I don't recall that. [250]

Q. As to your testimony yesterday, although the statement that you say you obtained from Mr. Schnee on September 3, 1946, was comparatively

(Testimony of John D. Caldwell.)

short and although you found Mr. Schnee completely alert to everything going on about him, entirely rational and completely free from pain, it took you from an hour to an hour and a quarter to obtain the information from him to put into the statement?

A. Well, to write it down, also obtain the information and write the information down took about an hour to an hour and a quarter.

Q. Did you find Mr. Schnee able to relate without difficulty from beginning to end what he knew about the accident?

A. There were some points I asked him and that I took down and I wrote those down when he gave them to me.

Q. You spoke yesterday of numerous alterations and amendments made.

A. I didn't say that, sir.

Q. Sir?

A. I don't believe I said that.

Q. If you challenge me on it we will have the record read with his Honor's permission, but I recall it. Let me, if I can, refresh your recollection. I recall you said to begin with you weren't the best writer in the world, that your writing was difficult to understand or to read, that your wife was one of the people who could read your writing— [251] you might put me down as another person that can read your writing; in addition to your poor writing there were many amendments and corrections and that in order to facilitate the reading of it and in

(Testimony of John D. Caldwell.)

order to get a second copy of it, that you had your wife type it off.

A. I believe my testimony was oftentimes when making statements there are changes and corrections and the last question you asked me was at this time, at the time you took Mr. Schnee's statement did you change his statement; my answer was I don't remember of any.

Q. Is that your answer now, you don't remember?

A. Whether I don't remember if there were any at that time.

Q. If you stated yesterday in your testimony there were so many corrections and amendments you were mistaken about that, or you intended it in a general way you encountered those difficulties in taking statements in general?

A. Yes, statements in general.

Q. Now, Mr. Caldwell, what injuries did you receive in your accident?

A. I had a laceration over one eye, had a fractured hip and a fractured pelvis bone.

Q. Were you in extreme pain? A. No, sir.

Q. For how many days after the accident do you recall you were in extreme pain? [252]

A. I don't recall I was in extreme pain. I was very nervous for the first few days. I was quite nervous, I mean irritable, lying in bed. As soon as I got over that I wasn't in any pain to speak of at all. The only pain I had was I had some slight

(Testimony of John D. Caldwell.)

cramping after about a month in the opposite leg with the muscles in my calf through disuse, but not the place it was injured.

Q. That injury has left you with a slight limp?

A. No, sir.

Q. You had a limp for some period of time?

A. Yes, before the accident.

Q. Before the accident you had a limp?

A. Yes.

Q. I see. After you had your hip broken that straightened that out?

A. No, the limp was just the same. The limp was the same after the accident as before.

Q. Did your nerves make you moan and cry out as though in pain?

A. Yes. Not cry out. I remember my wife, before she passed out she came up to see me on Sunday following the accident; I told her I was very restless and nervous.

The Court: We don't want to hear all that. We are not trying his case, Mr. Gillen.

Mr. Gillen: I understand. [253]

The Court: Answer "yes" or "no," did you moan and cry out? A. No, sir.

Q. (By Mr. Gillen): You did not?

A. No.

Q. Are you telling us now, though, you received a fractured pelvis and hip and you never experienced any severe pain?

Mr. Thompson: I object to that on the ground it has been asked and answered.

(Testimony of John D. Caldwell.)

The Court: Answer once more.

A. Yes, I had some pain.

Q. Isn't it a fact that you were given morphine and other narcotics to allay your pain during the time that you were in the hospital?

A. Not that I know of, sir.

Q. Not that you know of? A. No, sir.

Q. Did you ever complain of pain and ask for relief while you were in the hospital?

A. Not pain. As I said before, I said I was very nervous the first couple of days.

Q. You were in a cast, were you not?

A. No, sir.

Q. No cast? A. No, sir. [254]

Mr. Gillen: I think that is all of this witness, Your Honor.

Redirect Examination

By Mr. Thompson:

Q. Going back to your testimony yesterday, Mr. Caldwell, I believe I asked you, or counsel for the plaintiff asked you about this stick or stake that is referred to, been referred to in this case, and plaintiff's statement. Do you know what became of that?

A. Not from my own personal knowledge, I don't.

Q. Did you ever make any investigation to attempt to find it? A. I went and inquired.

The Court: Just answer "yes" or "no." Did you make any investigation?

(Testimony of John D. Caldwell.)

The Witness: Yes.

Q. (By Mr. Thompson): Were you able to find it? A. I was not.

Mr. Thompson: That is all.

Mr. Gillen: No further questions.

M. O. WALLACE

having been previously sworn, was recalled and testified as follows:

Direct Examination

By Mr. Thompson: [255]

Q. Mr. Wallace, you have been sworn and previously testified in this case? A. Yes, sir.

Q. Calling your attention now, Mr. Wallace, to the document you have in your hand, will you turn it over and tell me is that marked Exhibit F for identification? A. Yes, sir.

Q. Now, with respect to Defendant's Exhibit F for identification will you examine that document and tell me whether or not that is your signature that appears on that document? A. Yes, sir.

Q. And when and where did you sign that document, Mr. Wallace?

A. Out at St. Mary's Hospital.

Q. And the signature of Adolph J. Schnee, who signed that, Mr. Wallace, if you know?

A. Mr. Schnee.

Q. Was it signed in your presence?

A. Yes, sir.

(Testimony of M. O. Wallace.)

Q. What was the date you signed it, do you recall? A. August 30th, 1946.

Q. Did he sign it at the same time or approximately at the same time you signed it, Mr. Schnee I mean?

A. He signed it and I witnessed his signature.

Q. Were you at St. Mary's Hospital for the express purpose [256] of seeing Mr. Schnee?

A. Yes, sir.

Q. And for the purpose of taking a statement from him if possible? A. Yes, sir.

Q. And will you tell the Jury just what transpired there at that time, as you recall it, Mr. Wallace, in connection with your visit to Mr. Schnee. What was said by you, what was said by him? Just detail the account of your visit.

A. I was instructed to get a statement from Mr. Schnee. I said, "Well, I will have——"

Q. But tell what happened, don't remark about what you stated, just what happened at the hospital.

A. After I got to the hospital?

Q. That is right.

A. I carried on a conversation with him for quite a little while about his injuries.

The Court: What time of day was it?

A. Some time in the afternoon. It was during the visiting hours, in the afternoon visiting hours.

The Court: All right. Go on and tell what happened.

Mr. Gillen: Now, may it please the Court, if in

(Testimony of M. O. Wallace.)

telling what happened the witness will undertake to relate what is contained in the statement, I would ask the Court to afford me an opportunity to examine him on voir dire. [257]

The Court: Tell how you got the statement before you tell anything that is in it.

The Witness: Well, I told Mr. Schnee what I was there for and asked him if he felt like giving me a statement, and he said yes. I told him I would like to fix up the accident report, so I put the papers together and I started in to question him and I would write down as he would answer the question.

The Court: Go ahead and examine him if you wish.

Mr. Gillen: Thank you, Your Honor.

Q. Now, Mr. Wallace, when you went into the hospital it was August 30th you remember distinctly?

A. I remember it was the day after the accident.

Q. All right. Did you encounter anybody in authority, any person connected with the hospital to get permission to go to Mr. Schnee's room?

A. Yes, sir.

Q. Who? A. A nurse.

Q. Where did you find the nurse?

A. I found her at her desk out in the hall.

Q. On the first floor?

A. I couldn't tell you what floor it was.

Q. At the entrance of the hospital?

A. No, it was the floor that he was on. [258]

(Testimony of M. O. Wallace.)

Q. How did you find your way to the place?

A. I inquired in the office.

Q. From whom did you inquire? At the desk?

A. At the desk?

Q. Yes.

A. I don't know. It was one of the nuns there, I couldn't say.

Q. And she directed you to the place?

A. She said he was at place so and so. I don't remember the room.

Q. Then you went up and encountered his nurse?

A. The nurse was at her desk or table, so I asked her, I said, "Will it be okay for me to talk to Mr. Schnee?" She said, "Yes, it is."

Q. Did you ask her anything about whether Mr. Schnee was under any opiates or anything at the time?

A. No, sir—may I go back a little further?

Q. Surely, if you have an explanation or something.

A. Before I went to the hospital I called the doctor and asked him if it was okay to get a statement from Mr. Schnee; he said yes.

Q. Which doctor was that?

A. I can't recall.

Q. You know Dr. Francis was the surgeon in charge of his case, don't you? [259]

A. No, I don't.

Q. Did you know Dr. Francis, from the time Mr. Schnee was received in the hospital the night before,

(Testimony of M. O. Wallace.)

which was approximately eight o'clock at night, Dr. Francis had operated on him until half past one that morning, the morning of August 30th, 1946?

A. I didn't know that?

Q. What time of the day did you call the doctor?

A. It was sometime during the day before I went over there.

Q. And can you tell us any better than you told his Honor when he asked the question, what time of day it was when you got to the hospital?

A. Well, it was shortly after two o'clock. It was sometime during the visiting hours.

Q. Do you know what the visiting hours at St. Mary's Hospital are, what they were at that time?

A. As I remember, it was two o'clock.

Q. Two o'clock?

A. Yes, as I remember it.

Q. Until what time?

A. Well, I don't know.

Q. You don't know. Now, when you got into the hospital room where Schnee was, can you describe the room for us? A. No, sir, I can't.

Q. Can you describe if there was more than one bed? [260]

A. There was one bed.

Q. Can you describe if there was more than one patient in the room?

A. There was one patient.

Q. And that patient was Mr. Schnee?

A. Yes, sir.

(Testimony of M. O. Wallace.)

Q. Now, can you describe the appearance of Mr. Schnee when you got in there?

A. When I came in the door I saw his eyes were closed; I thought, well, he is asleep.

Q. What is it?

A. I thought he was asleep. His eyes were closed, so I turned to go out. As I did he called to me and says, "Hello, Mr. Wallace," so I turned back then and talked to him for quite a little while.

Q. Can you tell us something about his appearance, what you observed about him?

A. Well, he was pretty well bandaged up, lots of bandages.

Q. Where?

A. On his head and arms and later on he showed me on his legs and around.

Q. What did he show on his legs?

A. Just showed me where he was bandaged up, showed me his ankle or foot, I don't know just exactly which.

Q. How did he show it to you? Did he lift his leg up? [261]

A. No, raised the cover over to the side.

Q. You observed bandages?

A. He had bandages on, yes.

Q. Gauze bandages?

A. I presume they were.

Q. With adhesive tape on?

A. I believe they were.

Q. Do you know what a leg cast looks like, a plaster of Paris leg cast?

(Testimony of M. O. Wallace.)

A. There were no casts.

Q. You are positive of that?

A. I am pretty sure.

Mr. Gillen: I wonder, if it please the Court, if I might see the exhibit that was identified yesterday by the attendant from St. Mary's Hospital, the medical attendant?

Mr. Henderson: I believe this is voir dire, Your Honor, not cross-examination.

The Court: Give him the exhibit, Clerk.

Q. (By Mr. Gillen): Mr. Wallace, if the records of the hospital showed, at St. Mary's Hospital showed that there was a cast on the left hand and a cast with a pressure pad on the right leg and a cast on the left leg, would that refresh your recollection as to what you saw?

Mr. Henderson: We would like to make an objection that it is improper voir dire and unsuitable matter, not matter [262] that is proper and relevant at this time; reading hospital records not in evidence.

The Court: Objection overruled.

A. I don't recall seeing the cast.

Q. (By Mr. Gillen): You don't recall?

A. All I know, it was all covered with bandages.

Q. What about his head?

A. The head was bandaged up.

Q. You remember that distinctly? A. Yes.

Q. As a matter of fact, if you were there on August 30th, 1946, you know, don't you, that the man was in an oxygen tent?

(Testimony of M. O. Wallace.)

Mr. Henderson: We object to it as argumentative if you were there you know certain things.

The Court: Answer. Was he in an oxygen tent?

A. He wasn't in an oxygen tank when I was there.

The Court: Tent. A. Tent.

Q. (By Mr. Gillen): Do you know what an oxygen tent looks like?

A. I have seen them, yes.

Q. Did you see any oxygen equipment in the room when you were there that day?

A. I believe there was some.

Q. Describe what you saw. [263]

A. There was a tank.

Q. What kind of a tank?

A. A long cylinder with green paint on it.

Q. All right, anything else?

A. I don't remember seeing anything else. The fact of the matter, I wasn't interested in those things. They were just there and I noticed them. I didn't make any mental reservations on those things.

Q. Didn't make any mental reservations?

A. On the appearance of the room, the bed, anything like that. It is just like I would come into anybody's home, I come in to visit with them. I wasn't examining the room.

Q. You were interested in the boy's condition, whether or not he was in any physical and mental shape to give a statement?

(Testimony of M. O. Wallace.)

A. That was what I was interested in.

Q. Was anybody present besides you and Mr. Schnee when he gave you the statement?

A. Nobody present.

Q. At the bottom of that statement there was a typewritten portion written irregularly and at the very bottom of the page and surrounding what purports to be the signature of Mr. Schnee—I believe Mr. Schnee has identified it as looking very much like his signature and we are not disputing it. When was that typewritten portion put in?

A. That was put in at the superintendent's office. [264]

Q. When? A. The same day.

Q. After you brought it back? A. Yes, sir.

Q. Sir? A. Yes, sir.

Q. So the document was added to after you obtained the purported signature of Schnee, is that correct? A. Yes, sir.

Q. Now, Mr. Wallace, did you ever teach Mr. Schnee anything about building batteries?

The Court: Now——

Mr. Gillen: I beg your pardon. I am losing sight of the fact that I am on voir dire.

I think I should perhaps make the observation to your Honor I believe the voir dire has indicated that the document was altered after the signature of the plaintiff was supposed to have been obtained.

Q. (By Mr. Thompson): Mr. Wallace, what if anything was written on the statement at the time Mr. Schnee signed it?

(Testimony of M. O. Wallace.)

A. You want me to read that?

Q. Yes, read the part that is there.

A. "I have read and understand the foregoing statement and it is true and correct to the best of my knowledge and belief."

Q. Everything else on the statement there was put there before [265] Mr. Schnee signed it, is that correct?

A. Everything but this on the back.

Q. Whose handwriting is the document here where it is handwritten?

A. This is typewritten.

Q. In whose handwriting is the body of the instrument filled in? A. Mine.

Q. And whose signatures did you say appeared on there?

Mr. Gillen: That has been asked and answered.

Q. Did you at any time read what was written there to Mr. Schnee or did he read it?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial. After he is supposed to have obtained the signature he went back and somebody wrote in that Schnee had read it and everything there was true.

Q. (By Mr. Thompson): Will you answer the question?

A. I gave it to him to read.

Q. Did he look at it and examine it?

A. He read it through thoroughly.

Mr. Gillen: I move it be stricken. Nobody can

(Testimony of M. O. Wallace.)

tell whether anybody reads anything. All they can say is that the person looked at the document.

The Court: Motion denied.

Q. (By Mr. Thompson): Did Mr. Schnee, after he had [266] examined the document and before or at the time he signed it make any other comment about the document? A. No, sir.

Mr. Gillen: Just a moment. I object to any comment attributed to Mr. Schnee upon the basis of the request I made of your Honor yesterday that we be afforded an opportunity before your Honor rules on any comments of any alleged statement of Schnee, orally or otherwise, to present some evidence as to his condition.

The Court: Objection overruled. Proceed.

Q. (By Mr. Thompson): Would you answer the question? A. No.

Mr. Thompson: At this time we offer Defendant's Exhibit F, except that part of it the witness says was typewritten after the signing; the Jury be instructed to disregard that.

Mr. Gillen: Your Honor, I see no reason for the offer at this time in view of your Honor's previous announcement to counsel that you would reserve your ruling.

The Court: I am ready for you to be heard now. You want to be heard further?

Mr. Gillen: I would like to produce some witnesses as to the man's condition as part of the voir dire.

(Testimony of M. O. Wallace.)

The Court: No, the request is denied. The exhibit is admitted. The Clerk is instructed to obliterate the part [267] referred to.

Mr. Gillen: May I say something, Your Honor?

The Court: Yes.

Mr. Gillen: If it is admitted it can be shown to the Jury; if it can be shown to the Jury the only thing I can do with any later testimony, if it please the Court, is possibly deduct from it, and if your Honor was afforded the opportunity of availing himself of hearing the testimony relevant to the man's condition it might affect your Honor's ruling or it might influence your Honor's ruling. I respectfully request the Court to let me produce those witnesses.

The Court: I am willing that you should do that when your turn comes. In the meanwhile the exhibit will not be exhibited to the Jury. It is admitted now.

(Defendant's Exhibit F in evidence.)

Q. (By Mr. Thompson): At any later time after you took that statement did you see Mr. Schnee?

A. Yes, I saw him several times.

Q. And where did you see him?

A. At St. Mary's Hospital.

Q. And what was the purpose of those later visits, Mr. Wallace?

Mr. Gillen: Objected to as calling for a self-serving statement. [268]

The Court: He may answer.

(Testimony of M. O. Wallace.)

Q. (By Mr. Thompson): What was the purpose of your later visits?

A. I just went out to see how he was getting along. I felt I should call on him once in a while.

Mr. Thompson: That is all.

The Court: Cross-examine, Mr. Gillen.

Mr. Gillen: No further examination. I beg your pardon, I would like to ask a question on another topic of cross-examination.

Re Cross-Examination

By Mr. Gillen:

Q. Mr. Wallace, did you teach Mr. Schnee anything about building batteries? A. Yes.

Q. When?

A. It was when he went on this district at Willcox.

Q. That was the occasion when your relief man failed to appear on the job, went off the job and you picked Schnee up hurriedly and had him get his clothes together and go on the train with you to Willcox? A. Yes, sir.

Q. As I understood your testimony or recollect your testimony given here on direct examination, you remained with him, you talked with him about the work on the way on the [269] train from Tucson to Willcox? A. Yes, sir.

Q. As I understand, you spent part of one day and part of another day with him at Willcox?

(Testimony of M. O. Wallace.)

A. I spent one full day and part of two days.

Q. Part of a second?

A. And part of a third.

Q. All right, when was it you taught him to build a battery?

A. That was the first and the second day.

Q. Sir? A. The first and the second days.

Q. Did you actually build a battery with him?

A. Yes.

Q. Where was that done?

A. The first one was at the east end of Hado.

Q. You were out on the car with him, is that correct?

A. Yes. I went out to familiarize him with the district and we discovered these batteries that this man ahead of him had neglected. They were right on the verge of failing. We had to get battery material to refill them.

Q. Did you have any equipment along?

A. We had everything to build batteries with, yes.

Q. What all did you have to build batteries with?

A. The elements, the battery elements, water and tools that he had used in doing the work. [270]

Q. And what else?

A. Well, we had the motor car.

Q. What else to build batteries?

A. What?

Q. What else to build batteries?

A. He had a pair of pliers and a paddle to stir the solution.

(Testimony of M. O. Wallace.)

Q. What kind of a paddle?

A. Well, usually use a board.

Q. What kind did you have that day?

A. The board off of a box.

Q. Had the board off of a box; can you tell us what shape it was?

A. I should judge it was between 28 and 30 inches long. That one end was cut down with a knife to sort of make a handle.

Q. When you say the board off a box, what do you mean by that? Do you mean the type of light wood found on the side of, say, an orange crate or apple box?

A. About three-eighths of an inch thick and I judge three inches wide.

Q. And whittled down to make a handle to hold on to? A. Yes, sir.

Q. Did you also instruct him on how to wrap that up in something after it had been in the caustic so it wouldn't [271] get in the other materials?

A. No, sir.

Q. That was the practice, wasn't it, when building the batteries, and the light wooden paddle was saturated with the caustic solution you wouldn't lay it down, you would wrap it up in newspaper, isn't that correct? A. No, we never did that.

Q. You never did that. I think that is all.

MRS. MARY JO RUSSELL STEVENS

called as witness by the defendant, having been first duly sworn to state the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. Please state your name?

A. Mrs. Mary Jo Russell Stevens.

Q. Where do you reside?

A. 1006 East Alta Vista.

Q. In Tucson, Arizona?

A. In Tucson, Arizona.

Q. How long have you resided in Tucson, Mrs. Stevens?

A. Just about four years.

Q. And what is your profession?

A. I am a registered nurse.

Q. Where were you working in August of 1946, Mrs. Stevens? [272]

A. St. Mary's Hospital.

Q. What position did you occupy in St Mary's Hospital in the latter part of August, 1946, and the early part of September, 1946?

A. I was a supervisor on the orthopedic floor.

Q. At St. Mary's Hospital?

A. Yes.

Q. I will ask you, Mrs. Stevens, if you are acquainted with the plaintiff, Mr. Schnee, if you ever saw this young man before?

A. I don't recognize him to look at.

Mr. Gillen: What was that answer? I don't recognize him——

(Testimony of Mrs. Mary Jo Russell Stevens.)

The Court: To look at, yes.

Q. (By Mr. Thompson): Were you working there in the hospital? Do you know whether or not in September, early in September, 1946?

A. Was I working there?

Q. Yes, as supervisor? A. Yes.

Q. By referring to your records, the records of the hospital, could you tell whether or not there was a patient named Adolph J. Schnee in the hospital at that time? A. Yes.

Q. And do you recall the name, aside from the individual [273] do you recall the name Schnee at this time? A. Yes, I do, I remember it.

Q. Can you recall, what was the patient suffering from, Schnee, at that time?

Mr. Gillen: We will stipulate to all those things, what he was suffering from. We don't need to waste time on that.

Q. (By Mr. Thompson): Do you recall whether or not in his treatment it was necessary for the patient to be bandaged at that time? A. Yes.

Q. When you saw him during that period do you recall whether or not he always had some bandages on?

Mr. Gillen: Just a moment, the question is leading, suggestive, assuming. The witness has no recollection of recognizing the patient.

The Court: Frame it a little differently. Just ask her what she remembers about the case.

Mr. Thompson: Yes.

Q. What do you recall about the Schnee case at this time?

(Testimony of Mrs. Mary Jo Russell Stevens.)

A. I remember the patient. I remember the instance. I remember part of his injuries. I remember what room he was in. I remember taking care of him as a supervisor.

Q. Could you tell the Jury what his appearance was on those occasions when you saw him, as to the treatment he was receiving, if any? [274]

Mr. Gillen: Just a moment. I submit the record would be the best evidence of the treatment and the record is here before the Court.

The Court: She may testify.

A. I know he was in a fracture bed because he had fractures. He was well bandaged, various limbs where he had been injured.

Q. (By Mr. Thompson): Do you recall whether or not he was in the hospital for some time while you were there?

A. Yes, he was. I think I left before he did, if I remember correctly.

Q. And your name at that time, Mrs. Stevens, was Stevens?

A. No, Mary Jo Russell. I have been married since.

Mr. Gillen: What is that, please?

Mr. Thompson: Exhibit G.

Q. Will you look at the bottom of that Defendant's Exhibit G for identification and tell me whether or not your signature appears on that document? A. Yes, it does, in two places.

Q. You say in two places; you mean on each page? A. Yes.

(Testimony of Mrs. Mary Jo Russell Stevens.)

Q. On the first and second page of the exhibit. Do you recall at this time, Mrs. Stevens, having signed that document? A. Yes, I do.

Q. And do you recall the circumstances under which you [275] signed it?

A. Yes. Ordinarily we don't sign things like this. I can't remember having signed any other ever. We usually find a witness for them. I did sign this one, I witnessed it. It was read to me in the presence of the patient. He signed it and I signed it and this other gentleman signed it.

Q. The other signatures appearing on there were signed at the same time you signed it?

A. They were put on at the same time mine was.

Q. Do you recall what was the condition of the patient at that time, were you talking to him or was he talked to in your presence? A. Yes.

Q. Describe his condition generally at that time as far as his conversation with you or with anyone in your presence.

A. I can't necessarily describe the conversation. I don't recall it word for word or even probably the body of it, with the exception it was about this.

Q. Was any conversation held with the patient while you were present?

A. You mean did the patient and I converse?

Q. Yes.

A. Yes, I believe all three of us did. I can't tell you what about. [276]

Q. Do you know whether or not at that time

(Testimony of Mrs. Mary Jo Russell Stevens.)

there had been any opiates administered to him recently, do you know?

A. Well, as I know I checked to see and was under the impression at that time he had not, and I know now he hadn't. It was nine o'clock the night before that he had a narcotic for rest that night, but he had had nothing since the night before.

Mr. Thompson: I think that is all.

Cross-Examination

By Mr. Gillen:

Q. What time of day was this statement taken?

A. It was approximately after lunchtime, which would be eleven-thirty or twelve o'clock, between then and one-thirty or two, somewhere in that period.

Q. Now, how do you recall that the patient hadn't had any narcotic since the night before this date at nine o'clock?

A. At the time when we were asked to witness this or at the time I was asked to witness it, I was asked to check the chart to make sure he had none before he was asked to sign it. As I understand, it is customary, they don't if they have had anything.

Q. All right. And how do you recall you had checked the chart and found he didn't have any before the night before?

A. I am going on the original—I went on the assumption I had checked it without remembering it. [277]

(Testimony of Mrs. Mary Jo Russell Stevens.)

Mr. Gillen: Then I move it all be stricken out because the witness is going on an assumption.

The Court: Motion denied.

Q. (By Mr. Gillen): You mean to say now you are just assuming you did certain things. You have no memory of doing certain things?

A. I have no memory of going out and checking that chart. I have seen it since and I know it was that late.

Q. When did you see it?

A. I saw it yesterday.

Q. You saw it yesterday? A. Yes.

Q. What time yesterday?

A. Some time yesterday morning.

Q. What is it?

A. No, it was yesterday afternoon.

Q. Where did you see it yesterday afternoon?

A. Here in the Post Office Building.

Q. Who showed it to you?

A. I don't know who the lady was.

Q. What is it?

A. I don't know who the clerk was or lady that showed it to me.

Q. Where in the Post Office Building?

A. It was on the fourth floor. [278]

Q. On the fourth floor of this building?

A. Yes.

Q. Do you know the room number or what room it was? A. No, I don't.

Q. Who took you there?

(Testimony of Mrs. Mary Jo Russell Stevens.)

A. Mr. Thompson took me there.

Q. Mr. Thompson took you there, I see. You looked at the exhibit to refresh your recollection?

A. Yes, I did.

Q. Now, do you have any recollection or did you refresh your recollection about how long this man was in an oxygen tent?

A. The only thing I wanted to see on the chart was to be sure of my memory in regard to how long it had been before he signed the paper that he had had a narcotic. I wasn't sure of the time element, that was the only thing I looked at.

Q. Did he have any other type of sedative?

A. No, he didn't.

Q. He had no type of sedative, is that correct?

A. To my knowledge all he had was the morphine, grains one-quarter, at nine p.m. or 9:15 the night before. He had nothing during the rest of the night or that day until bedtime and he had a sleeping capsule. He wasn't under narcotics except for rest and occasional pain at that time. [279] My own writing is on the chart.

Q. Mrs. Stevens, you were the supervisor of nurses in the particular section, the orthopedic department, is that correct? A. That is right.

Q. Your duties didn't bring you generally in direct contact with the patients, the nurses handled the patients and you superintended the handling of the patients?

(Testimony of Mrs. Mary Jo Russell Stevens.)

A. No, that is not true. I had direct contact with each patient.

Q. You actually had contact with all of the patients?

A. I did all their treatments and medications, most of their treatments and most of their medications, not all of them, no.

Q. Mrs. Ramirez, was she a supervisor at that time?

A. I don't remember that she was. I don't know.

Q. I note she gives quite a bit of medication. Miss B. Anders, was she a supervisor?

A. Not to my knowledge.

Q. Was Miss Burke a supervisor? A. No.

Q. Was Miss Courtney a supervisor?

A. No.

Q. Was Miss Anders a supervisor? A. No.

Q. Was Miss Gray a supervisor? [280]

A. No.

Q. Was Miss Jimenez a supervisor?

A. No. Most of those were student nurses.

Q. What is 100,000 units of penicillin considered, is that considered a treatment or what is it considered? A. It is considered a treatment.

Q. I note in the chart there are quite a number of treatments of penicillin, injections of penicillin, 100,000 units at a time given by the young ladies whom you have identified as student nurses?

A. Yes.

Q. I note also narcotics administered by those same young ladies, would that be so? A. Yes.

(Testimony of Mrs. Mary Jo Russell Stevens.)

Q. And your name was Russell at that time, is that correct? A. Yes.

Q. I don't find any record of you giving any treatment in this case. Your name would be there if you had given the treatment?

A. Not necessarily. We don't have to sign our name to treatments; a medication and narcotics, yes.

Q. Not penicillin?

A. Not always, sometimes with student nurses, yes.

Q. I notice page after page of penicillin, up to eighteen million, two hundred thousand and eighty units, all [281] signed with one exception by nurses who administered them. Does that refresh your recollection on whether the nurses signed for giving penicillin?

A. As a rule they do, but it isn't a necessity, is the only way I can put it.

Q. It isn't a necessity? A. No.

Q. As I recall your testimony, Mrs. Stevens, you don't have any distinct recollection of Mr. Schnee personally?

A. He looks a little differently than he did then.

Q. Do you recognize him at all?

A. Vaguely.

Q. I understood you to say this morning that you didn't recognize him by looking at him?

A. That is very true. It is a very vague recollection. It is a recollection of bandages and a cast and fracture bed more than it is the individual.

Q. The recollection you had at being present at

(Testimony of Mrs. Mary Jo Russell Stevens.)

the signing of the paper that was shown you was that it was sometime in the afternoon?

A. That is the way I remember it, probably after lunch.

Q. How do you place that?

A. Because of the fact that we were probably busy in the morning; then, too, during rest hours we usually don't disturb patients. I went off duty, at that time I was working [282] until four. It would have been somewhere around lunchtime, the morning, I had been busy at that time making rounds with the doctors.

Q. That is the only way you can place it?

A. I am not definite on the time element, no.

Q. If you went off duty at four o'clock what time did you go on? A. Eight o'clock.

Q. Eight o'clock in the morning; so you would be on between say ten and twelve on that day, would you not? A. Yes.

Q. And the visiting hours at the hospital are when? A. Three to four and seven to eight.

Q. Would it have come to your attention that a patient with the injuries, extensive injuries that the patient Schnee was suffering at that time, had had a visitor with him from an hour to an hour and a quarter in the forenoon, around eleven o'clock in the morning?

A. You mean did I see the visitor?

Q. Would such a thing come to your attention as supervisor of the orthopedic department?

A. It could, yes.

(Testimony of Mrs. Mary Jo Russell Stevens.)

Q. Could a patient so badly injured as that have a visitor from an hour to an hour and a quarter around eleven o'clock in the morning, between eleven and twelve, say, without it [283] coming to your attention as the supervisor who has direct contact with each patient as you said?

A. I would say no, because they would have to come and ask me, either me or my assistant.

Q. The chart notes when you have a visitor, does it not?

A. Sometimes, yes. Those are not important elements on any chart.

Q. Is it the rule of the hospital the chart notes when you have visitors? A. No.

Q. Do you require your student nurses to chart visiting? A. Not necessarily, no.

Q. Now, when the visit is in irregular hours is it noted? A. Not always, no.

Q. Visitors are not considered part of the patient's care or what happens to them? Keeping away visitors from very sick or injured people is considered part of the patient's care, is it not?

A. Yes, it is.

Q. The recollection you have of your participation in this preparation of this paper is what?

A. I remember being asked to come in and witness a patient's signature. Then the article was read to the patient in front of me and he signed it and I signed it.

Q. Did you read the article? [284]

A. It was read to me. I read it indirectly, I mean

(Testimony of Mrs. Mary Jo Russell Stevens.)

over the man's shoulder, but I didn't read it myself. It was read to the patient aloud.

Q. Do you remember who the man was?

A. Yes, Mr. Caldwell.

Q. You later became very well acquainted with Mr. Caldwell?

A. No, I have not seen him since, until yesterday.

Q. After that he became a patient of your hospital?

A. I later left. I became a nurse away from St. Mary's.

Q. You later heard Mr. Caldwell was in the hospital?

A. Not necessarily, no.

Q. You say you left shortly after that?

A. I said I left shortly after Mr. Schnee. I did not know Mr. Caldwell when he was a patient, to my knowledge.

Q. Was the paper all prepared?

A. Just as it is now.

Q. That is your best recollection?

A. Yes.

Q. Who signed first?

A. The patient, I assume. I can't swear to it, but I don't sign something until someone else signs it when I am a witness.

Q. I am asking you what you did, not what you would naturally do. I am asking you for your memory. Do you remember who signed it first?

A. No, I don't exactly.

Q. As between you and Mr. Caldwell, do you re-

(Testimony of Mrs. Mary Jo Russell Stevens.)

member who signed first? A. No, I don't.

Q. The paper was ready? A. Yes.

Q. Were you there at any interview had between Mr. Caldwell and the patient Schnee when Mr. Caldwell was purportedly obtaining the information put in that paper?

A. I don't believe so, no.

Q. All you were asked to do was go in and sign?

A. Witness the patient's signature.

Q. Do you have any recollection of being asked by Mr. Caldwell that morning, a matter of from one to two hours or more prior to the time you were requested to come in and witness the signature, whether or not Mr. Schnee, the patient, had had any narcotics or sedatives? A. Yes, I was.

Q. When?

A. Sometime that morning before I was asked to witness this. I have no time element I can put that accurately on.

Q. All right. Who asked you?

A. Mr. Caldwell asked me.

Q. You have a distinct recollection of Mr. Caldwell going in and asking you that in the morning prior to this? [286]

A. Yes. He told me he had Dr. Francis' permission to see the patient.

Q. You remember that distinctly? A. Yes.

Q. I thought you said you weren't aware of the fact that there had been a visitor in Mr. Schnee's room?

(Testimony of Mrs. Mary Jo Russell Stevens.)

A. I said I wasn't always aware of visitors.

Q. You did say you weren't aware of the fact that there was a visitor in that morning and you didn't think a visitor could be there on that morning an hour to an hour and a quarter in the forenoon without you knowing about it.

A. Ordinarily I would know they were there, yes.

Q. What did you know about it this morning?

A. You mean whether I actually knew whether he was there, I remember or not?

Q. Is it your testimony now that you remember that Mr. Caldwell was with that patient that morning from an hour to an hour and a quarter?

A. I have no idea how long he was there. I know he was there.

Q. Is it your testimony now you knew he was there at all seeing the patient that morning before you were asked to witness the signature in the afternoon?

A. I know he was in there doing something, talking to the patient; it was later I was called in. [287]

Q. Why didn't you tell us that before when you were asked about your knowledge of the visiting of the patient?

A. I am a little confused. I don't remember denying it. I know you asked me if I did know there were visitors.

Q. I am not trying to confuse you. I am trying to get at your memory of what occurred; if there is

(Testimony of Mrs. Mary Jo Russell Stevens.)

anything confusing about my question please tell me.

A. All I know is this: Mr. Caldwell came and asked me if I would check the chart to see if the patient had any narcotics at that time to interfere with his questioning; I checked the chart and told him that it was all right, and he had told me he had Dr. Francis' permission. From then on he went to the patient's room and I paid no more attention and I don't know anything about it in that interval until I was asked to come in and witness the signature. I went and witnessed it and came back. What period of time he was in there I don't know. I know the beginning and end of it; what went on in between, I don't know.

Q. You wish to correct your testimony——

Mr. Thompson: I object to that question.

The Court: Let him finish the question.

Q. (By Mr. Gillen): You wish to correct your testimony, then, given before that this patient could not have had a visitor there from an hour to an hour and a quarter without your knowing about it?

A. I didn't say that.

Mr. Thompson: I object to that on the ground it is assuming something not in evidence.

Mr. Gillen: I would be happy to have the record read.

The Court: We are not going to read the record. Answer the question if you can?

A. I don't know if I can.

Mr. Gillen: Let me put another question.

(Testimony of Mrs. Mary Jo Russell Stevens.)

Q. Is it your testimony now you did know Mr. Caldwell was in there from an hour to an hour and a quarter that morning?

A. I knew he was in there; I didn't know how long.

Q. Mrs. Stevens, are you telling us now you have a distinct recollection, as you sit there now, of the incident occurring on September 3, 1946, four years ago, of Mr. Caldwell coming to you and saying, "Is this patient capable of talking? Has he had any narcotics?" You have a distinct recollection of having gone to the chart and checking it and found the patient hadn't had any narcotics since the night before and telling him he could go in there?

Mr. Thompson: I object to that question on the ground such questions are in there and have all been asked and answered.

The Court: Answer it again.

A. Did I recall all of that?

Mr. Gillen: Would you read the question. [289]

The Court: No, don't read it.

A. Yes, I recall the instance. So far as I know this is the only legal paper I signed.

Q. This isn't about signing a legal paper, this is about checking the chart.

Mr. Thompson: If it please the Court, she is entitled to give her reasons for the recollection.

The Court: Ask the question, Mr. Gillen. One more question, ask it. Ask another question.

Mr. Gillen: Was there a ruling?

(Testimony of Mrs. Mary Jo Russell Stevens.)

The Court: Nothing to rule on. Ask another question. Finish the examination.

Q. (By Mr. Gillen): What I am trying to determine is whether or not you have remembered through the ensuing four years that in the forenoon of September 3, 1946, at the request of Mr. Caldwell you went to check a chart to see whether or not a patient named Schnee had any narcotics during the day and what his condition was, whether or not he could be visited. A. Yes.

Q. You have remembered that all this time?

A. No, I had to do a little memory recalling in the last couple of days. I had forgotten a lot of it.

Q. Somebody refreshed your memory on it?

A. No, the case was brought before me and I refreshed my [290] own memory.

Q. How, by talking to somebody?

A. I was asked if I remembered the paper, if I remember it at this time.

Q. Who asked you? A. Mr. Caldwell.

Q. When did he see you and where?

A. I saw him yesterday.

Q. He told you, did he not, that he had gone to you that morning and asked you to find out whether or not the patient had had any narcotics or sedatives and whether or not he could visit with the patient?

A. He asked me what I remembered about the case.

Q. Yes. Did you say you remembered that?

A. I remembered parts of it, yes, and the rest

(Testimony of Mrs. Mary Jo Russell Stevens.)

has come back gradually. I have tried to remember the details.

Q. Came back gradually with the help of Mr. Caldwell? A. Not necessarily, no.

Q. Whether necessarily or not, did it come back partly through the help of Mr. Caldwell?

A. Small part of it, yes.

Q. One of the small parts of it was he had asked you that morning and you had checked the record there and told him the man would be all right to talk with?

A. I remember that part myself. The only thing I wasn't [291] sure of was how long it had been since the patient had narcotics. In my mind I assumed I had given the accurate answer when I told him no. I wondered about my own judgment. Then I checked it, that is the reason I wanted to see the record again. I saw it yesterday and it was just as I thought it would be. I did have some doubts because it has been a long time.

Q. And you have seen lots of patients with fractures since then?

A. Not necessarily with fractures.

Q. Lots of patients have had sedatives and morphine? A. Absolutely.

Q. Probably thousands? A. Could be.

Q. What else did Mr. Caldwell do to refresh your recollection; on what other portions did he refresh your recollection?

A. Nothing I can think of.

(Testimony of Mrs. Mary Jo Russell Stevens.)

Q. Didn't he refresh your recollection on any part of it? A. Only through conversation.

Q. That is the way we all refresh each other's memory is through conversation. What portion of the incident did he refresh your recollection on?

A. All he did was ask me if I remembered the occasion, if I remembered all about the incident of signing my name to [292] that paper and what I recalled about it.

Q. All right. You told him what you recalled about it and you recalled it was the only paper you had signed up to that time at St. Mary's?

A. I am not saying it is the only one. I am saying I think it is the only one. I don't recall signing any others.

Q. You have forgotten if you signed others?

A. We rarely sign them.

Q. If you have signed others you now forgot what they were? A. Yes.

Q. Do you remember any other papers you have signed for patients since 1946?

A. I have signed various papers like this, but nothing like this. We have been cautioned not to.

Q. Cautioned by whom?

A. By our teachers in training, to stay out of legal involvement, don't sign things unless absolutely necessary.

Q. What was it that made you think this was absolutely necessary in this instance?

A. The only thing I can recall, as supervisor of

(Testimony of Mrs. Mary Jo Russell Stevens.)

the floor I cannot ask students, they were not permitted to; I assume there was not anyone else available.

Q. There were nuns in charge there who were your [293] supervisors?

A. I was working with a nun and at that time it happened she was the head nurse and I was supervisor.

Q. There were nuns there that had the conduct of the hospital or wards?

A. Yes, in other departments.

Q. Was there any reason why you didn't refer Mr. Caldwell to a nun?

A. None in particular, no.

Q. Is there any other reason you can think of now why this was the only paper you had signed that you can remember up to that time?

A. I don't quite get your question. You mean, am I sure I never signed any others?

Q. Is there any reason you remember that was the only paper you had signed up to that time?

A. Except I remember this explicitly, remember a large part of signing it.

Q. It is a fact, is it not, that Mr. Caldwell refreshed your recollection or called to mind he had contacted you that morning to determine——

Mr. Thompson: Just a minute——

Mr. Gillen: May I finish?—whether or not the patient had any narcotics and was in a condition mentally or physically to talk to him? [294]

(Testimony of Mrs. Mary Jo Russell Stevens.)

Mr. Thompson: I object to that on the ground it has been asked and answered.

The Court: Answer again.

A. In the course of the conversation we discussed it, yes.

The Court: Will you read the question to the lady again.

(Last question read.)

A. Well, yes, we did discuss it.

Q. And he refreshed your memory on that, and you hadn't remembered it, had you?

A. I remembered parts of it, yes.

Q. What parts did you remember and what parts did he tell you about?

Mr. Thompson: If it please the Court, that question has been asked one time.

The Court: I will give you five minutes more on this examination.

Mr. Gillen: I beg your pardon, Your Honor?

The Court: I will give you five minutes more.

Mr. Gillen: I am through then, if your Honor Honor takes that position.

The Court: Suit yourself.

Mr. Gillen: The record will bear me out that I have never had a direct answer on this particular phase of it.

The Court: The record will not bear you out on that fact. Call another witness. You are excused, lady. [295]

MARY STEWART

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name for the record.

A. Mary Stewart.

Q. Where are you employed?

A. At the Southern Pacific Sanitorium.

Q. How long have you been employed there?

A. About five and a half years.

Q. Where do you reside?

A. 123 N. Plumer, Tucson.

Q. What is your position at the Southern Pacific Sanitorium?

A. I am a stenographer-clerk.

Q. As such what are your duties?

A. I have various duties, taking admissions of patients and accident reports and other office work.

Q. I will ask you to examine the Plaintiff's Exhibit H for identification there, and tell me whether or not you have seen that document before?

A. Yes, I have.

Q. When did you first see the document?

A. Well, I first saw it when I took this accident report from the patient. [296]

Q. Do you recall the date? Can you tell from the examination of it the date it was taken?

A. October 3rd.

(Testimony of Mary Stewart.)

Q. What year? A. 1946.

Q. And who was present when you took it, if you recall? A. Just the patient and myself.

Q. What was the purpose of taking that statement?

Mr. Gillen: Objected to as calling for a self-serving statement and conclusion.

The Court: Answer it.

(Question read.)

A. We take accident reports from all injury patients so we will have a record of it for our charts.

Q. I will ask you whether or not you prepared the statement that appears there?

A. Yes, sir, I did.

Q. Whose signature does it bear? I am talking about the top half.

A. It bears my signature and the patient's signature.

Q. And the information that appears on that statement is in your handwriting?

A. Yes, it is.

Q. From where did you get that information?

A. I got the top information from the patient.

Q. How did you get it from him?

A. I asked the patient the questions from his bedside.

Q. Was it then or some later time it was signed by you and the patient?

A. No, it was at that time.

(Testimony of Mary Stewart.)

Q. And that is your own handwriting?

A. Yes, it is.

Q. And the lower part of it is your handwriting also?

A. That is right.

Q. Is the signature there of the doctor? Whose signature is that?

A. I signed for the doctor.

Q. Is that the usual practice?

A. It is.

Q. You conversed with the patient at the time you were taking that statement?

A. Yes.

Q. Did he apparently know what he was talking about?

A. Apparently he did.

Mr. Gillen: I move that be stricken so that I may interject an objection.

The Court: What?

Mr. Gillen: I move the answer be stricken.

The Court: Disregard the answer to the question, Gentlemen of the Jury. Ask the question again and don't [298] answer it, lady.

Q. I ask you whether or not the patient at the time you took the statement apparently knew what he was doing in making you the answers.

Mr. Gillen: I object to it as calling for her opinion and conclusion.

The Court: She may answer.

A. Apparently the patient knew what he was doing.

Q. (By Mr. Thompson): Did you have any previous knowledge about the matters appearing in the upper half of that, before you talked to the patient?

A. No, I did not.

(Testimony of Mary Stewart.)

Q. Had you had any previous information where or how he was injured prior to the time you took that statement? A. No.

Q. At that time you were not acquainted with the patient that signed it? A. No, I wasn't.

Q. Did the patient sign it in your presence?

A. Yes.

Q. Do you know whether or not this is the person who signed that statement?

A. Yes, I believe he is.

Q. You mean the plaintiff who sits here by counsel? A. That is right. [299]

Q. You had occasion to see him for some time after that in the sanitorium?

A. Yes. He was an out patient after that.

Q. An out patient? A. Yes.

Mr. Thompson: At this time, if it please the Court, I offer in evidence the upper half of the exhibit, Exhibit H, that part appearing above plaintiff's signature.

Mr. Gillen: I ask your Honor reserve his ruling until I have had a chance to examine on it.

The Court: It is admitted provisionally the same as the other exhibits. Now cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Now, Mrs. Stewart, you say you had no previous knowledge concerning this patient's case until this date of October 3, 1946? A. No, I didn't.

(Testimony of Mary Stewart.)

Q. Hadn't it come to your attention this patient was a Southern Pacific employee who had been a patient for some six weeks at the St. Mary's Hospital in Tucson?

A. Had it come to my attention, you say?

Q. Yes. A. I don't remember.

Q. Hadn't it come to your attention this very office was [300] requesting a transfer so that the expense to the railroad of leaving the patient in the St. Mary's Hospital could be obviated and the patient could be brought to the sanitorium conducted by the Southern Pacific.

Mr. Thompson: If it please the Court, I want to make just this objection. The question of counsel has assumed something not in evidence and something contrary to the fact.

The Court: Answer it. Do you want the question read?

The Witness: Yes.

(Last question read.)

A. No, because I don't handle that part of it. The manager handles that.

Q. Do you have any recollection of how the patient came to the hospital?

A. I didn't see the patient come into the hospital.

Q. You didn't see the patient come in?

A. No.

Q. You don't know whether the patient was ambulatory or non-ambulatory?

(Testimony of Mary Stewart.)

A. The patient probably came by ambulance and came to the back door, I don't know.

Q. When did you first see the patient?

A. When I took the statement from him at his bedside.

Q. Was this in the nature of an admission?

A. No, I did not take the admission. I got the accident report.

Q. You took the accident report?

A. Yes. That is the accident report.

Q. Do you recall where you saw this patient?
Was it at his bedside? A. Yes.

Q. Do you recall what ward or where he was?

A. No, I don't.

Q. Do you recall how long the patient remained at the Southern Pacific Sanitorium?

A. No, I couldn't state how long he was there.

Q. Was it within your knowledge or recollection the patient was only there seven days, then he was transferred due to a change in his condition back to St. Mary's Hospital? A. No, I don't know.

Q. Do you have anything to do with discharging the patients? A. No, I don't.

Q. Do you have anything to do with admitting patients? A. Yes.

Q. But you didn't admit this patient?

A. No, I didn't.

Q. Do you recall going to this patient and telling him you wished to have him sign an admission request? [302]

(Testimony of Mary Stewart.)

A. An admission request?

Q. Yes, or admission blank or something to do with admission?

A. Nothing to do with admission, no.

Q. You don't recall saying that to him?

A. No.

Q. Do you recall saying anything to the patient about requiring him to sign a request for a transfer?

A. No, I don't.

Q. From one hospital to another?

A. No, I don't.

Q. Where did you get your information you put in over the signature of the doctor which you say you signed?

A. We get that from the doctor or from the patient's chart.

Q. Do you know how you got this?

A. No, I can't remember.

Q. Can't remember whether you got it from the doctor or the patient's chart? A. No.

Mr. Gillen: I think that is all.

Mr. Thompson: The exhibit was admitted conditionally as the others?

The Court: That is right.

LELAND E. LYONS

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows: [303]

Direct Examination

By Mr. Thompson:

Q. Please state your name.

A. Leland E. Lyons.

Q. What is your employment, Mr. Lyons?

A. Division engineer on the Rio Grande Division.

Q. Will you speak up?

A. Division engineer on the Rio Grande Division.

Q. For the Southern Pacific Company?

A. Yes, sir.

Q. How long have you been employed by the Southern Pacific Company?

A. March 20, 1920.

Q. Were you employed by the Southern Pacific Company in August, 1946? A. Yes, sir.

Q. Calling your attention to the date of August 29, 1946, where were you living at that time and what was your official position with the Southern Pacific Company?

A. I was living in Tucson, Arizona, and I was assistant division engineer on the Tucson Division.

Q. Do you have occasion to recall the date of August 29, 1946? A. Yes, sir.

Q. What recalled it to your mind? [304]

(Testimony of Leland E. Lyons.)

A. On that date what recalls it to my mind is the fact that, of this accident at Willcox, on that date I made a motor car inspection trip.

Q. Will you tell the Jury just where you were and what you did on the date of August 29th?

Mr. Gillen: Just a moment, objected to as incompetent, irrelevant and immaterial, not bearing upon the issues of the liability, what he did on that day.

The Court: He may answer.

A. On the morning of August 29 I made arrangements to make a motor car inspection trip with the roadmaster at Bowie, Mr. Wisner, going to leave Bowie about eight o'clock in the morning towards Tucson, our motor car inspection trip being made to inspect the track, switches, and so forth, for maintenance purposes. I proceeded with this particular roadmaster to Willcox and west of Willcox to the end of his district which is known as Cochise.

Q. Now, Mr. Lyons, did you later have occasion to visit the scene of the accident in which the plaintiff, Mr. Schnee, was involved? A. Yes, sir.

Q. With reference to that point I will ask you whether or not you, in company with Mr. Wisner, passed over that particular stretch of track on August 29th? A. Yes, sir. [305]

Q. At about what time?

A. Well, it could have been—it was in the early forenoon, possibly between ten and eleven o'clock.

Mr. Gillen: What date was this?

Mr. Thompson: August 29th.

(Testimony of Leland E. Lyons.)

Q. I will ask you whether or not later that day you heard of an accident that had happened to the plaintiff, Schnee? A. Yes.

Q. And what, if anything, did you do with respect to investigating that accident and when did you make that investigation?

A. I made arrangements to go to the site of the accident the next morning.

Q. And did you go there? A. Yes.

Q. Who accompanied you?

A. Signal supervisor Jacobson.

Q. Is that A. C. Jacobson? A. Yes, sir.

Q. Are those his initials? A. Yes, sir.

Q. Did you go directly to that point upon reaching Willcox? A. Yes, sir.

Q. And how were you directed there?

A. We arrived by automobile or pickup truck the early part [306] of the morning, determined where the accident was, or approximate location of it, then drove directly there, parked the automobile on the highway and found the site of the accident.

Q. Will you just tell the Jury in your own words what, if anything, you found there that was out of the ordinary? What came to your attention that morning with respect to the condition of the rails and the track?

A. On arriving at the site and determining it was the site due to the physical disturbance of the ballast and marks on the ties which indicated that a derailment of some sort had occurred at this loca-

(Testimony of Leland E. Lyons.)

tion, finding evidence that unquestionably this was where the derailment was; and it fitted our location described to us as being approximately two miles east of Willcox, we started examining the track to determine what might have caused the derailment, and in the course of this examination we looked for flange marks or a point of derailment, as we refer to in an accident of this nature, on the rails to see if we could see any flange marks on the rails themselves. We found none. We found marks to the south of the north rail which were unquestionably flange marks of the motor car. We found a tie to the west of the derailment which had indications of a stick or something having been forced into the westerly side of the tie. At that time the motor car had been removed [307] and had been hauled to Willcox. The tools had been picked up. It was evident in my mind——

Mr. Gillen: Pardon me. I would like to interrupt the witness and ask that a portion of the witness' answer be stricken as a pure conclusion. This is a long narration and I am compelled to interrupt.

The Court: Motion denied.

Mr. Gillen: Does your Honor care to hear what portion?

The Court: Yes, state your motion.

Mr. Gillen: The portion I wish to have stricken is the portion where the witness says, "We found a tie that appeared to have had a stick or something pushed into it on the west side." I move the Court

(Testimony of Leland E. Lyons.)

it be stricken on the ground it is pure opinion and conclusion; also it is too remote as to time.

The Court: Motion denied. Continue.

Q. I will ask you whether or not you have seen, showing you those photographs, the first one on top being Defendant's Exhibit C-4 for identification, and ask you if you have seen that photograph before, Mr. Lyon? A. Yes, sir.

Q. Then calling your attention to the next exhibit in order, Defendant's Exhibit C-5 for identification, and ask you if you have seen that photograph before? A. Yes, sir. [308]

Q. Now, calling your attention again to C-4, did you see the tie portrayed in that photograph, on the morning of August 30, 1946? A. Yes, sir.

Q. Does that photograph portray what you saw with respect to that tie? A. Yes, sir.

Q. Describe this indentation or abrasion you saw in the westerly side of the tie that you have been referring to, Mr. Lyons.

Mr. Gillen: Object to the question as incompetent, irrelevant and immaterial. There is no evidence here to establish this particular witness inspected this particular tie prior thereto or whether he knows what the condition of the tie was before the accident occurred to Mr. Schnee, or what was done in the intervening 24 hours after the accident occurred to Mr. Schnee and before he arrived on the scene.

(Testimony of Leland E. Lyons.)

The Court: Objection overruled. Read the question.

(Question read.)

A. This mark, as described on this tie, very definitely indicated——

Mr. Gillen: Just a moment. What it indicated and how it indicated is not a description.

Q. Just describe what you saw. [309]

A. I saw enough evidence on that tie——

The Court: No, just testify what you saw.

A. I saw portions of a stick thrust into the side of that tie on the westerly side thereof.

Q. You say a stick. Describe the stick if there was a stick there.

A. There was no stick on the ground. I saw the remains of a stick.

The Court: How do you know it was a stick rather than a piece of metal?

A. It was wood, Your Honor.

The Court: Still some remains there?

A. Yes, sir.

Q. (By Mr. Thompson): That were still in the tie? A. Yes.

Q. Do you recall approximately, with respect to the north and south rail at that point, taking away from Willcox as railroad east, with respect to the north and south rail where was this mark of the stick on the tie?

A. It was north of the south rail about sixteen inches.

(Testimony of Leland E. Lyons.)

The Court: What is the full width between rails?

A. Four feet eight and a half between gauge.

Q. You mean center to center?

A. Inside edge of the rail to the inside edge of the other rail is four feet, eight and a half. [310]

Q. By Mr. Thompson): Isn't that the top of the rail? A. The top of the rail.

Q. That is where the cars run?

A. Where the flanges strike the rail, yes, sir.

Q. With respect to this mark you saw on the tie, where if any place did you see flange marks?

A. East of that.

Q. Approximately how far from this tie you have been describing with the stick mark, how far was the first flange mark you observed?

A. There was one mark approximately twelve feet, as I remember, and another mark about twenty-one feet; then there were intermittent marks, the exact distance I do not recall.

Q. Where do they lead, those marks?

A. They lead towards the north side of the rail or towards the highway.

Q. And with respect to, away or toward Willcox?

A. Away from Willcox.

Q. Where did those marks end, if you know?

A. The motorcar, the marks extended for a distance of about one hundred and twenty feet and approximately half of that distance the motorcar appeared to have crossed the rail and landed on the outside or north of the north rail on the subgrade of the roadbed.

(Testimony of Leland E. Lyons.)

Q. With respect to these marks you saw on the ties, were [311] they running straight with the rails or at an angle?

A. At an angle with the rails.

Q. Angle which direction?

A. To the north.

Q. Where you saw the first flange marks on the ties, were there any marks on the ballast on the north side of the rail you observed?

A. Yes, sir.

Q. You say the distance from the point where you saw the tie marked by the stick to the last of the marks was about one hundred and twenty feet?

A. Approximately one hundred twenty feet. I remember checking three rail lengths, three times 39 would be 117 feet, be in the neighborhood of where the car came to rest. The ground was disturbed. You couldn't tell the exact location of that car at that particular point.

Q. With respect to the tie you found marked there, where was the mark approximately with respect to the top of the tie?

A. It was down on the west face of the tie three to four inches. It wasn't on the top of the tie.

Q. And could you describe it further as to the angle of that mark? Was it straight up and down?

A. It looked like it was protruding in the tie on approximately a forty-five degree angle.

The Court: How far into the tie? [312]

A. Approximately a half of an inch.

(Testimony of Leland E. Lyons.)

Q. Could you give any dimension of width, size of the hole?

A. About an inch, or the over-all approximately an inch. It was embedded in there tight, Your Honor, dug it out with a penknife.

Q. (By Mr. Thompson): What was the diameter of the hole you saw there or mark, how the tie was marked?

A. It was a mark about three-quarters of an inch square, that is where it protruded into the tie.

Q. I believe you stated that Defendant's Exhibits C-4 and 5 are a portrayal of that mark and that tie as you saw it there on the morning of August 29, 1946, is that correct?

A. I think it was the morning of August 30, 1946.

Q. August 30, 1946, that is correct, is it?

A. May I have your question again?

Q. Those pictures, those Exhibits C-4 and 5 correctly portray the tie and marks you saw on the ties on the morning of August 30, 1946, about which you have been testifying?

A. Yes, sir.

Mr. Thompson: We offer those two Exhibits, Your Honor.

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial. There is no foundation laid to show this had anything to do with the accident. It hasn't been established whether or not he knew that was in the same condition or in a changed condition prior to the accident. [313]

(Testimony of Leland E. Lyons.)

The Court: They are admitted.

(Defendant's Exhibits C-4 and C-5 in evidence.)

Q. (By Mr. Thompson): Mr. Lyons, that day of August 30, 1946, did you at any time examine a motorcar which had been involved in this accident?

A. No, sir.

Q. And from the point of the accident, where did you go?

A. I went from the point of the accident back to Willcox, then back to Tucson.

Mr. Thompson: I believe that is all.

Cross-Examination

By Mr. Gillen:

Q. Did I understand you to say that you saw a tie with a scar or abrasion on it and some parts of wood protruding from it so firmly wedged therein it had to be pried out with a penknife, is that correct? A. Yes, sir.

Q. Did you pry it out with a penknife?

A. No, sir.

Q. Who did? A. Mr. Jacobson.

Q. At whose direction did he do it?

A. At my direction. Let me take that back. Can I clarify something?

Mr. Thompson: No, go ahead and answer the question. [314]

A. Indirectly at my direction.

(Testimony of Leland E. Lyons.)

Q. (By Mr. Gillen): Indirectly at your direction? A. Yes, sir.

Q. You were his superior, were you not?

A. Yes, sir.

Q. You were investigating the accident?

A. Yes, sir.

Q. You knew a boy had been very badly hurt?

A. Correct.

Q. You knew it was important to determine what had caused the accident? A. Correct.

Q. You were seeking evidence of that to be able to report to your superiors and be able to protect the interests of the company, is that so?

A. Partially so.

Q. And you were gathering evidence and preserving evidence that would tell the story of the accident? A. Correct.

Q. All right, what happened to the splinters that were pried out of the tie you say you saw?

A. I do not know.

Q. Did you instruct anybody to preserve them?

A. I did not.

Q. When did you see this stick or the remnants of a stick? [315] A. When did I see it?

Q. Yes.

A. The morning I made the investigation on the ground.

Q. The morning of the 30th of August?

A. You mean the part I saw in the tie?

Q. You referred to a stick in answer to a question by His Honor, you referred to remnants of a stick? A. What was the question?

(Testimony of Leland E. Lyons.)

Q. Where did you see it?

A. I never saw the stick.

Q. You never saw the stick? A. No, sir.

Q. Did I misunderstand you or did you misunderstand His Honor? I thought His Honor asked you if you had seen a stick and you said it was wood; then you said you saw the remnants of a stick.

A. I am mixed up on that. I endeavored to indicate to His Honor I had seen evidence which indicated it was a stick and not metal, it was wood.

Q. Were you therefore all the time in both answers to Mr. Thompson and His Honor, were you referring all the time to the splinters you saw in the tie? A. Yes.

Q. I see. And you never saw a grade stake or banged or chewed up or scarred surveyor's grade stake? [316] A. No, sir.

Q. Did you go to the signal maintainer's shed at Willcox?

A. Not to the immediate vicinity of the shed, no, sir.

Q. You were making an investigation; was there any reason why you didn't look in at the handcar or any reason why you didn't look at anything else that was evidence in that case?

A. The investigation after the preliminary portion was determined was turned over to Mr. Jacobson.

Q. I am asking you, was there any reason why

(Testimony of Leland E. Lyons.)

you didn't follow through and see all of the evidence there was?

A. I can't remember at this time why there was any reason.

Q. Now, Mr. Lyons, Mr. Robert Ward, you are acquainted with him, are you not?

A. Yes, sir.

Q. Would it refresh your recollection if I were to tell you that the record would reveal here that Mr. Robert Ward testified here that on the day following the accident that he took you and Mr. Jacobson to the signal maintainer's shed where he had the handcar involved in the accident and a damaged grade stake, surveyor's grade stake, picked up at the scene of the accident, under lock and key, and that he exhibited to you two gentlemen at that time both the car and the surveyor's grade stake, would that refresh your recollection as to whether or not you saw the stake? A. It does not.

Q. You would say Mr. Ward was mistaken at least about your presence there? A. Yes, sir.

Q. So you left the investigation in the hands of Mr. Jacobson? A. Correct.

Q. And didn't give him any directions what he should do with the evidence; left it entirely up to him? A. Correct.

Q. Did you ever talk to Mr. Caldwell about this investigation? A. Mr. who?

Q. Mr. Caldwell, the Claims man?

A. About this investigation?

(Testimony of Leland E. Lyons.)

Q. Yes.

A. No, sir.

Q. He never interviewed you?

A. No, sir.

Mr. Gillen: I wonder if I might see the photographs of the tie. I saw them before but the significance of them wasn't pointed out to me. I am sorry, but I would like to have either the witness or counsel indicate to me what particular portion of this pretty well battered old tie, what portion they are referring to?

Mr. Thompson: Have the witness. [318]

The Court: Mark it for him. Mark it.

Mr. Thompson: Yes.

Mr. Gillen: Do you have something to mark it with?

The Witness: Ink would be best on this film.

The Court: Before you mark it, ask him what you want him to indicate?

Mr. Gillen: Well, I wanted him to indicate what portion he has described here as the portion of the tie where he observed splinters of wood embedded, and where they had been removed?

The Court: Can you indicate that place with a cross, Witness?

Mr. Gillen: If he would just circle the area.

Mr. Thompson: The other one as well, I guess.

(Witness indicates on Exhibits C-4 and 5.)

Q. (By Mr. Gillen): How large a hole would

(Testimony of Leland E. Lyons.)

you say was left in the tie after the splinters had been removed by Mr. Jacobson?

A. To the best of my memory, it would be a hole approximately three-quarters of an inch in diameter.

Q. Three-quarters of an inch in diameter; would you say it was a round hole?

A. It would give the indications of a round hole, but wouldn't necessarily be symmetrical and round.

Q. Generally round or generally square, that he left in the tie? If you care to have the Exhibit to assist you, I would [319] be glad to have it in your hands.

A. It would be generally square.

Q. Generally square?

A. It would be somewhat round but it could be square.

Q. Would looking at the Exhibit again assist you? A. Yes.

(Exhibits handed to witness.)

The Witness: Generally round.

Q. Now, sir, will you tell me what is the circumference of the head of a spike that holds the rail?

A. The circumference—in the first place a spike is not round to start with. The outside circumference might be in the neighborhood of—I can't answer that. I have never measured the circumference of a spike, the top of a spike you referred to.

Q. You couldn't lay your hands on a spike read-

(Testimony of Leland E. Lyons.)

ily over the noon hour? A. We could get one.

Q. Mr. Lyon, did you inspect this particular tie prior to the accident?

A. No, sir, I have no memory of it. I looked at all the ties, but whether I looked at this particular tie, I don't remember.

Q. On this particular inspection tour you weren't walking? A. No, sir.

Q. You were riding on a motorcar? [320]

A. Yes, sir.

Q. What rate of speed?

A. From six to fifteen miles an hour.

Q. When you say you looked at all the ties as you went along there you looked at them over the front of the motorcar or over the back?

A. Right.

Q. Of course, you didn't look front to back, front to back. You just looked one way or the other, is that right? A. That is right.

Q. Did you observe any other splinters of wood any place along other than this one tie?

A. On my inspection?

Q. No, on your investigation?

A. I do not recall observing any other splinters.

Q. Was Mr. Ward with you folks?

A. I do not recall Mr. Ward being with me.

Q. Just you and Jacobson?

A. To the best of my memory.

Q. Did Mr. Jacobson take you up to the point of first derailment and point out to you there in that vicinity any splinters of wood?

(Testimony of Leland E. Lyons.)

A. Mr. Jacobson and I were together, yes.

Q. My question is, did Mr. Jacobson point out at the point of first derailment as you have described it, where the car [321] first left the tracks, any splinter on the surface of the right of way or ballast?

A. I do not recall he pointed out any splinters on the ballast or ties.

Q. You were able to follow the course of that derailed car from the flange marks left in the ties astraddle the north rail all the way down to the point where the car came to rest, isn't that correct?

A. Yes, sir.

Q. The car traveled parallel but veered to the north with the track, is that correct?

A. Very definitely veering to the north.

Q. Then at one point about midway, the car, if you recall correctly, the car had completely jumped the track and proceeded along on the surface of the ground?

A. That was the indication, yes, sir.

Q. At the place where the car came to rest, you stated the ground was so disturbed you couldn't tell anything about the position of the car?

A. No, sir, I didn't say that.

Q. What did you say about where the car came to rest, the condition of the ground?

A. I said the ground was so disturbed you couldn't tell exactly where the car had traveled after it had derailed.

Q. You mean, after it had left the tracks? [322]

(Testimony of Leland E. Lyons.)

A. Yes, sir.

Q. Of course, you knew, did you not, a section crew was there the night before and had hauled up a flatcar and put the motorcar on that?

A. Yes, sir.

Q. And that might account for the disturbed appearance of the ground, is that correct?

A. It could have accounted partially for it.

Q. Had the ballast at this particular tie where you say you observed the wood embedded, had that ballast been disturbed?

A. The ballast appeared to have been crushed down a bit. I wouldn't say the ballast was particularly disturbed.

Q. Now, there appears in these photographs, to me at least, a distinct indentation in the ballast as compared with the rest of the surface. I will ask you, was that the way it appeared? Handing this to the clerk, I will ask you if you will look at those pictures again and tell us if that is the way it appeared to you on that day, or disturbed more since then for the purpose apparently of getting a photograph?

A. It isn't uncommon for the ballast to be down as it shows on this, down in comparison with the top of the tie.

Q. Was it that way when you saw it?

A. To the best of my ability, that was the way it was when I saw it.

Q. It is at a considerably lower level than the

(Testimony of Leland E. Lyons.)

rest of the [323] ballast alongside of that tie, is it not?

A. At the very point of that mark it appears to be so, yes, sir, probably six inches of it.

Q. The mark is well up toward the surface or top side of the tie, isn't it?

A. The mark is nearer the top surface of the tie than it is the bottom of the tie, if that is what you mean?

Q. (By Mr. Gillen): I don't have any further questions with the exception I would like Mr. Lyons to produce a spike if he will for possibly one question.

The Witness: Your Honor, what type of spike does the gentleman desire?

Mr. Gillen: The type that appears in the picture there.

The Witness: I can only assume that is a main line spike. I say that because there are various dimensions.

Mr. Gillen: That was certainly taken on the main line, wasn't it?

The Witness: Yes. In other words, I want to be sure that is what you want.

Mr. Gillen: It wouldn't be too much trouble to get one of each?

The Witness: I can get you one.

The Court: What kind of wood is that tie made of?

The Witness: That tie was possibly made of—I cannot answer that question. [324]

(Testimony of Leland E. Lyons.)

The Court: It was treated?

The Witness: Treated, unquestionably, because we do not use untreated ties on our main line.

The Court: 1:30, gentlemen.

(Whereupon a recess was taken at 12:00 o'clock noon until 1:30 o'clock p.m.)

Q. (By Mr. Gillen): Mr. Lyons, were able to secure some spikes?

A. Yes, sir. Do you desire it?

Q. Will you hand it to the lady who is Clerk of the Court? Did you measure it, by the way?

A. I measured as close as I could the so-called circumference of the elliptical head of the spike.

Q. Yes; what was it?

A. Four and nine-sixteenths, as carefully as I could measure the spike.

Q. What is the diameter?

A. It has two diameters. Which way do you have in mind? It isn't a circle.

Q. No, I understand.

A. It is elliptical.

Q. What diameter did you measure?

A. I did not actually measure the diameter, but the diameter of it as I checked with the plan is one and five-tenths one way and one and nine-sixteenths the other.

Q. A little over an inch each way? [325]

A. Almost an inch and a half, yes, in one case.

Q. I wonder if I might ask you to look again

(Testimony of Leland E. Lyons.)

at the different photographs, C-4 and C-5, and compare the hole that was dug in the tie with the spikes that appear in the picture for comparison of sizes.

Have you had an opportunity to compare the spikes; also the hole out of which the splinters were dug? A. Correct.

Q. By looking at them by comparison and knowing what the diameter of the spikes are, would that in any wise change your opinion as to the size of the hole that was dug in the tie?

A. Are you inferring that the head of this was driven in here?

Q. What is it?

A. Am I supposed to compare the head of this spike as to what I think the size of the hole was in the tie?

Q. Maybe I am not making myself clear. Your testimony was that there was a hole dug in the tie; that was, if I remember, three-quarters of an inch in diameter, is that correct?

A. That is correct.

Q. I am asking you to look at that hole in that tie as it appears in the photograph, compare it with the spikes that appear in the same photograph; I am asking you now, having in mind the diameter of the spikes, if that changes your opinion as to the size of the hole? [326]

A. No, sir.

Q. It does not. Now, let me ask you this. Then

(Testimony of Leland E. Lyons.)

when you made your tour of inspection between Willcox and the point of the accident or upon the afternoon or the day of the accident, and as I recall your testimony, prior to the happening of the accident, were there any work crews that you encountered on the way?

A. I do not recall any particular work crews, but unquestionably, there were. The Section Foreman of each section was unquestionably encountered.

Q. You don't recall if you saw any crews working at the time? A. On the entire distance?

Q. Between Willcox and railroad east to whatever point you went? A. I don't remember.

Q. You did go beyond the point of this accident on your tour of inspection? A. Yes, sir.

Q. Did you encounter any crew of surveyors working that day? A. I do not recall I did.

Q. You don't know whether you did or not?

A. I don't recall I did.

Q. Do you recall you didn't? A. No, sir.

Q. So you don't know whether you did or not?

A. Correct.

Q. Your inspection was to determine the appearance of the track and the ties with relation to regulations and safety, is that correct?

A. Correct.

Q. Did you see any surveyor's grade stakes along the way that you recall?

A. Not that I recall. Unquestionably I must

(Testimony of Leland E. Lyons.)

have seen some stakes, but I don't recall any particular stake.

Q. You think you must have seen some stakes that day but you don't recall specifically?

A. That is right.

Q. Of course, you have testified already that you didn't see the stake that Mr. Ward stated that he had under lock and key, and therefore you couldn't know of your own knowledge whether or not the splinters taken out of the tie by Mr. Jacobson in your presence were ever compared with the wood of this stake that was under lock and key? You understand my question?

A. I understand your question, yes.

Q. I am asking you now from your own knowledge? A. Only hearsay.

Q. All right. Now, will you tell us what kind of a motor car you were operating that day, that is August 29th? A. Fairmount, M-19 type car.

Q. Can you describe it for us?

A. Well, it is a four-wheel, belt driven, gasoline engine motor car, manufactured by the Fairmount people, what we call a Roadmaster's and Supervisor's inspection car.

Q. Does it have a superstructure in the middle?

A. It has a deck and it also has seats to the side for riding, which you would ride in the forward position. It has a clutch and a brake and ignition key for operating.

Q. Does it have tool wells?

(Testimony of Leland E. Lyons.)

A. Does it have what?

Q. Tool wells?

A. It has what we call tool wells.

Q. Will you describe tool wells such as are found on those motor cars?

A. It has a tray on either side, and it also has a compartment, small compartments for small tools such a pliers, screwdriver, on one side and another small compartment for the coils, electric coil to function the spark from the battery. It also has a battery underneath the deck.

Q. The tool well, has that a ledge all around it to keep things from dropping out of it?

A. Yes, sir.

Q. Can you give us the dimensions of height of the ledge around the tool box?

A. Approximately two and a half inches on the side and the [329] rear.

Q. Approximately two and a half inches on the side and rear?

A. Approximately above the deck, above the floor of it.

Q. Above the floor surface of the tool box?

A. Yes, sir.

Q. What about the front?

A. The front is raised approximately, to the best of my memory, about nine inches.

Q. About nine inches in front and those tool wells are put in those cars for the purpose of carrying equipment, tools and things?

(Testimony of Leland E. Lyons.)

A. For the purpose of carrying miscellaneous equipment.

Q. Are the ledges on the side and back, are they flush with the floor of the tool well, or is there an opening? A. They protrude above.

Q. I know that, but I say the wall of the ledge, if we may call it such, is it flush with the floor of the tool well or is it separated? You understand me?

A. In other words, is it a square corner of a box, I believe you are trying to say?

Q. Yes. A. Yes.

Q. There is no opening there?

A. Not that I remember.

Q. Is there any difference between the type motor car you [330] were operating that day and the type motor car involved in this accident?

A. Their construction is similar, but the other motor car was an M-9, I believe a smaller motor car, a shorter wheelbase.

Q. You mean the division and roadmaster have a more stylish motor car?

A. No, it will haul six men comfortably, while the other motor car will probably haul three.

Mr. Gillen: That is all.

Redirect Examination

By Mr. Thompson:

Q. Mr. Lyons, what is the height of the stand-

(Testimony of Leland E. Lyons.)

ard rail at the point of this accident, what was the height of those rails from tie to top?

A. Approximately very close to eight inches.

Q. And the ties are spaced how close together as standard?

A. The standard space is eighteen and a half inches, sometimes vary to eighteen inches.

Q. That is center of tie to center of tie?

A. Center to center.

Q. The width between the gauge, I believe you have given us?

A. Four feet, eight and a half inches.

The Court: How wide are the ties?

A. The ties are seven by nine. They are nine feet on the surface and seven inches and will vary from eight and three-quarters [331] to nine inches; eight feet in length.

The Court: What kind of ballast?

A. Slag, Your Honor.

Q. And they are joined, are they, the rails, by what method?

A. The rails are tied together by what we call sickle bars with four bolts.

Q. The rails are fixed how?

A. By spiking through the tie plate.

Q. (By Mr. Thompson): Talking now about this tie you said had the mark of a stick, could you have been mistaken about that? Could that have been the mark of a spike such as this, Mr. Lyon?

A. No, sir.

Mr. Gillen: Just a moment. May the answer be stricken. I want to offer the objection.

(Testimony of Leland E. Lyons.)

The Court: Disregard the answer.

Mr. Gillen: I offer the objection that counsel's Redirect Examination is improper; also he is Cross-Examining his own witness, asking his own witness if he is not mistaken about something that his own witness has testified to.

The Court: Read the question.

(Question read.)

The Court: Answer it.

A. No, sir.

Mr. Thompson: That is all. [332]

Mr. Gillen: That is all.

ALFRED C. JACOBSON

called as a witness herein by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thompson:

Q. Please state your name.

A. Alfred C. Jacobson.

Q. Where do you reside?

A. Oakland, California.

Q. Where were you residing in August, 1946?

A. Tucson, Arizona.

Q. Are you now employed by the Southern Pacific Company? A. Yes, I am.

Q. Were you employed by the Southern Pacific Company in August, 1946? A. Yes, sir.

(Testimony of Alfred C. Jacobson.)

Q. On the 30th of August, 1946, what was your position with the Southern Pacific Company?

A. Signal Supervisor on the Tucson Division.

Q. And that extends from Lordsburg to Yuma, does it? A. That is right.

Q. Main line through Willecox was on your territory? A. Yes, sir.

Q. You are acquainted with the plaintiff here, Adolph Schnee? [333] A. Yes.

Q. Had you known him prior to August 30, 1946?

A. Yes, sir, I interviewed Mr. Schnee when he was employed.

Q. Was a report made to you that Mr. Schnee had been injured some time late in August, 1946?

A. Yes, sir.

Q. What if anything did you do with respect to that information, Mr. Jacobson?

A. On the day Mr. Schnee was injured I was at Tucson, and late in the afternoon or evening I received a telephone call advising me of that accident.

Q. Did you ever go then after that to the scene of the accident?

A. The following morning I did.

Q. Who was in your company, if you recall?

A. Mr. Lyon was with me.

Q. That is Mr. Lyon who was then Division Engineer? A. Assistant Division Engineer.

Q. How did you go to the scene of the accident?

(Testimony of Alfred C. Jacobson.)

A. We drove there in an automobile or pickup, I believe it was.

Q. To what point did you go first?

A. On arrival at Willcox we stopped at Mr. Ward's house, Signal Maintainer, and asked Mr. Ward to get the detail of the location of the accident; then we proceeded to the place [334] where it occurred.

Q. At that point did you make any examination?

A. Yes, sir.

Q. Now, will you tell the jury in your own words as near as you can recall just what you saw and observed at that place that was out of the ordinary at all?

A. Well, sir, the motor car had been removed. There were marks on the ties between the rails indicating a motor car had left the rail and diverting the accident from the south rail to the north rail. The marks on the ties proceeded in an easterly direction towards the north rail. There were a number of ties marked. Then, the grass was considerably trampled where the ground had the appearance of the motor car having come to rest. Of course, my first interest was to attempt to discover what caused the derailment, and on walking west from the marks on the ties I found one tie that had been pierced with something that had all the appearance of being a stick. In fact, there were wooden fibers driven into the tie that were still there and in view of the fact that there was nothing

(Testimony of Alfred C. Jacobson.)

else in the vicinity where the derailment occurred, it was logical——

Q. No, wait. We won't ask you to draw any conclusions. You say you found this tie with reference to where the motor car came to rest, how far was it from where the motor car came to rest?

A. It was west from where the motorcar came to rest and about one hundred and twenty feet.

Q. In what position on this tie did you find this mark, Mr. Jacobson?

A. It was on the west side of the tie.

Q. And with respect to the top of the tie as it was placed on the ground, what was its location?

A. Oh, three or three and a half inches below the top edge of the tie.

Q. Was it possible at all to determine how it had been driven into the tie, whether straight down or at an angle?

A. No, it was at an angle, approximately 45 degrees that angled toward the tie.

Q. Were the marks on the ties which you found of the flanges, in what direction were they from this place where you found marked in the tie with the splinters? A. They were east of that point.

Q. What was the distance of the first you found?

A. There was one mark on the tie adjacent to the south rail about twelve feet from that tie, and another mark about twenty-one feet. There were several marks from there on diagonally across.

Q. With respect to the rails, where was this

(Testimony of Alfred C. Jacobson.)

mark you found on the tie that you have been referring to?

A. It was between the rails and from fourteen to sixteen [336] inches from the north rail.

Q. Now, were the splinters that you found there in the tie, were they similar to the material of which the tie was made? A. No, sir.

Q. And the grain of those splinters with respect to the grain of the ties, what was their situation?

A. The splinters—of course, the grain in the tie was horizontal and the splinters in this hole were lengthwise of the hole.

Q. And the grain of the tie was what?

A. Just at right angles.

Q. Then, did you find anything else at or around this point when you made your investigation, Mr. Jacobson?

A. Yes. There was a brake hanger between the rails.

Q. Where was the brake hanger?

A. It was west.

Q. Where with reference to this mark on the ties did you find the brake hanger?

A. It was also about one hundred and twenty feet from the mark we found on the tie.

Q. With respect to the rails, where was it?

A. It was between the rails.

Q. What was its position when you saw it?

Mr. Gillen: Pardon me. I offer the objection it is [337] incompetent, irrelevant and immaterial,

(Testimony of Alfred C. Jacobson.)

in view of their own testimony in this case it had been picked up, examined and put down again.

Mr. Thompson: I understand the testimony of the witness it was replaced where he found it.

The Court: You may answer.

(Question read.)

The Witness: It was laying on the ballast in what appeared to have been a place where it had been laying for some time.

Q. Then, did you from the point of the accident, did you go to any other place on that day, Mr. Jacobson, with respect to this investigation? Did you make any further investigation at any other point that day?

A. Well, after investigating at the site of the accident, we returned, rather I returned to Willcox.

Q. When you were at the scene of the accident that day, were any pictures taken in your presence?

A. Yes, sir.

Q. By whom?

A. By the S. P. photographer, I can't think of his name at the moment.

Q. He was an employee of the company?

A. Yes, sir.

Q. Turning the back of the first Exhibit, what is the [338] Exhibit, Mr. Jacobson? There are two separate Exhibits.

A. Exhibit C-3.

Q. There is more than one document?

A. C-4.

(Testimony of Alfred C. Jacobson.)

Q. Will you tell me which of those, if either of those Exhibits, were taken in your presence on August 30, 1946? A. C-1, C-2, also C-3.

Q. Starting with C-1, where was that picture taken? A. That was taken at Willcox.

Q. What did it purport to show?

Mr. Gillen: Just a moment. May it please the Court, the sites of these pictures have all been located. It is a matter of wasting time, relocating the sites. The photographer said he was out there and took the pictures at certain places.

Mr. Thompson: All right, I will offer them in evidence, then. Those are C-1, 2 and 3.

The Witness: Yes, sir.

The Court: Admitted.

Mr. Gillen: May I see the pictures? I don't have in mind which pictures they are.

The Witness: C-4 and C-5 were also at Willcox.

Mr. Gillen: I would offer the objection. May it please the Court, to C-1 and C-2. No objection to C-3. My objection to C-1 and C-2 is that they are posed or set-up pictures on something that the foundation hasn't been laid for yet, and [339] we would like Your Honor to look at them if you would.

The Court: I don't need to. They are admitted.

(Defendant's Exhibits C-1, C-2 and C-3 in evidence.)

Q. (By Mr. Thompson): Referring first to the first two that are separated there, that picture.

(Testimony of Alfred C. Jacobson.)

A. C-5.

Q. C-5, and what did that picture show?

Mr. Gillen: No objection to them being offered in evidence, those two pictures.

The Court: They are admitted.

Mr. Thompson: They are already in evidence.

Q. With regard to this tie you found marked, is that shown in the Exhibit C-5? A. Yes, sir.

Q. How about C-4? A. And C-4 also.

Q. Turning to the next Exhibit, that is the picture you had taken of what?

A. That was of the motorcar that was derailed.

Q. That was the motorcar that had been involved in the accident? A. Yes, sir.

Q. You took it where, or had it taken where?

A. At Willcox.

Q. With respect to the toolshed at Willcox, where? [340]

A. Just outside of the toolshed.

Q. Does it show the underside of that car?

A. Yes, sir.

Q. Calling your attention now to the point in the picture where the stick is pointing, I will ask you what you found under the car at that point when you examined it that morning in Willcox?

A. There was a piece of splintered wood under it.

Q. It was wedged under what part of the car?

A. Under the brake rod.

Q. Of the motorcar? A. Of the motorcar.

Q. Now, at the time you went to the toolhouse,

(Testimony of Alfred C. Jacobson.)

were you shown any other articles that had come from the scene of the accident, Mr. Jacobson?

Mr. Gillen: Just a moment. That would be calling for an opinion and conclusion, what came from the scene of the accident.

The Court: Answer yes or no.

A. Yes, sir.

Q. What were you shown that morning?

The Court: What are you getting at now?

Q. (By Mr. Thompson): Were you shown a surveyor's stake or stick of some kind that morning?

A. Yes, sir. [341]

Q. Who showed it to you? A. Mr. Ward.

Q. Did you have an occasion to examine it there or did you examine it there that morning?

A. I did.

Q. Now, this stick or stake he showed you, what did it look like, describe it to the jury.

A. It was about twenty-four inches long and it was made of three-quarter inch by an inch and a half stock and had the appearance of having been sharpened on one end; the other end had obviously been broken off.

Q. The ends of the stick, can you describe them?

A. The pointed end apparently and originally had the same point that a so-called grade stake would have with about an inch or an inch and a quarter broken off.

Q. What was the condition of the other end?

A. The other end was broken off and obviously

(Testimony of Alfred C. Jacobson.)

had been splintered, and on examining it with the shreds or fibers that were between the brake beam and the deck of the motorcar, it appeared that it had been broken off or those fibers had been broken off from the grade stake.

Q. I will ask you, did you see any other markings or marks on this grade stake of any kind?

A. Yes, there was a grease mark at the end where the fibers had broken off which quite obviously came from the grease on [342] the brake rod; then there were indications the stick had been used for stirring caustic soda——

Mr. Gillen: I move that be stricken as an opinion and conclusion of the witness without a foundation having been laid and without showing this man ever had any experience in that line.

The Court: Not for that reason, but another one. Disregard the last answer of the witness, gentlemen.

Q. Mr. Jacobson, was there a picture taken of that stick or stake there at the time the picture was taken of the motorcar?

A. Yes, I had the stick in my hand.

Q. Calling your attention to the Exhibits in evidence there, which Exhibit there shows the picture of the stake which you had in your hand?

A. C-1.

Mr. Gillen: May I see C-1, please.

Q. (By Mr. Thompson): Mr. Jacobson, in your employment for the Southern Pacific Company, did

(Testimony of Alfred C. Jacobson.)

you have occasion ever to build the signal batteries such as used on the railroad? A. Yes, sir.

Q. For over how long a time?

A. Well, for, oh, possibly ten years.

Q. Did you ever have occasion to observe what action if any the battery solutions have on wood during that period [343] of time? A. Yes, sir.

Q. With respect to this stake, could you describe it then, what appearance it had, if any, with respect to whether or not it might have been used in such a solution?

Mr. Gillen: I offer the objection that there was no foundation he used this particular kind of wood or had any experience with it. Our understanding from the evidence is grade stakes are never used in battery solution, orange box wood is used.

The Court: I think the question is objectionable. I did permit a question which said it appeared to have been in contact with this, that, or the other thing.

Q. Let me ask you then, Mr. Jacobson, if this stake ever appeared to have come in contact with any foreign substance, corrosive substance of any kind? A. Yes, sir.

Q. What length of the stake did it show that appearance?

A. As I recall, about eight or nine inches.

Q. Calling your attention now to Defendant's Exhibit C-2, calling your attention particularly to a stick shown under the car, portrayed there, was

(Testimony of Alfred C. Jacobson.)

that the stake about which you have been testifying?

A. That is the same stake.

Q. Now, the car in Exhibit C-1 shows it was being propped [344] up by some kind of stick or stake, what was that?

A. I believe it was either a sledge hammer handle or pick handle.

Q. The purpose of that was to see the under side of the car? A. That is right.

Q. Calling your attention again to C-1, will you with a pin or something mark on the exhibit where you found this wood that you said was wedged under the brake rod?

(Witness indicates on exhibit.)

Q. You have so marked Defendant's Exhibit C-1 at the point where you said you saw the wood left under the brake rod? A. Yes, sir.

Q. Calling your attention to Plaintiff's Exhibit 1, 2 and 3, I will ask you if you have seen those photographs before and what they show, if you know? A. Yes, I have seen the photographs.

Q. What are they?

A. They are photographs of the same car.

Q. *Were taken* under your direction?

A. No, I wasn't present when these pictures were taken.

Q. You can identify it as being the same motor-car, is that correct? A. Yes, sir.

Mr. Thompson: We offer them in evidence as Defendant's Exhibits J, K and L. [345]

(Testimony of Alfred C. Jacobson.)

The Court: Admitted.

(Defendant's Exhibits J, K and L in evidence.)

Q. Calling your attention to these photographs, Mr. Jacobson, particularly Defendant's Exhibits J, K and L, I will ask you if those exhibits show the wood that you said you found under the brake rod?

Mr. Gillen: I think the pictures speak for themselves, may it please the Court.

Mr. Thompson: I merely want to have him circle it so it may be identified by the jury.

The Witness: Yes, it does.

Q. Will you mark with the pin the circle of the point where that appeared?

(Witness indicates.)

Q. Let me ask you this, Mr. Jacobson, between the time you found the stick until the pictures were taken, were any changes made, any paint, anything of that kind placed on the stick or stake you testified you found——

Mr. Gillen: That would be calling for an opinion, calling for a conclusion.

Mr. Thompson: I am asking as far as he knows.

A. As far as I know, no.

Mr. Gillen: It has not been established that it was in his possession or care. It was out of his possession for 24 hours or so and had never been in his possession for [346] 24 hours or so after the accident. And there is no foundation laid and it

(Testimony of Alfred C. Jacobson.)

hasn't been established how long he had it in his possession afterward, if at all.

Mr. Thompson: Withdraw the question.

Q. How long were you at the toolhouse that morning, Mr. Jacobson?

A. I would say at least an hour.

Q. And during the time you were there, it was during the time you were there you observed this stake or stick you identified in evidence as being one of the Defendant's Exhibits, is that correct?

A. Yes.

Q. During that time no change was made in that stick up to the time the photograph was made?

Mr. Gillen: Just a minute. I don't understand there is any stick that is Plaintiff's Exhibit.

Mr. Thompson: No, I corrected that and said Defendant's Exhibit.

Mr. Gillen: I don't understand any stick that is shown in Defendant's Exhibit.

Mr. Thompson: It is shown in Defendant's Exhibit.

Mr. Gillen: I challenge the record.

The Court: Read the question.

Q. (By Mr. Thompson): During the time you were there, this stick which is on Defendant's Exhibit, was any change made in that [347] during the time you were there? A. No, sir.

Q. The picture was taken while you were there, in your presence? A. Yes, sir.

Q. Calling you attention to Defendant's Exhibit

(Testimony of Alfred C. Jacobson.)

B for identification, the motorcar shown there, had you seen that before?

A. It appears to be the same motorcar that was in this accident.

Q. There is shown there a yardstick; of course, that wasn't on the car when you saw it, is that correct? A. That is correct.

Mr. Thompson: We will offer in evidence Defendant's Exhibit B for identification, if it please the Court.

Mr. Gillen: May I find out what counsel is doing now? I understood counsel to say he was withdrawing something.

Mr. Henderson: No, offering B in evidence.

Mr. Gillen: Offering this entire exhibit in evidence?

Mr. Henderson: Yes.

Mr. Gillen: To which the plaintiff offers the objection because the pictures are posed or set-up pictures, having objects in the pictures and figures in the pictures that might misrepresent them.

The Court: They are admitted. [348]

(Defendant's Exhibit B in evidence.)

Q. (By Mr. Thompson): Calling your attention now particularly to Defendant's Exhibit D-4, will you give the numbers of those exhibits, Mr. Jacobson? A. D-1, D-2, D-3, D-4 and D-5.

Q. Do those all show the picture of the same motorcar? A. It appears to be.

(Testimony of Alfred C. Jacobson.)

Mr. Thompson: We offer those, D-1 to D-5, in evidence, if it please the court.

Mr. Gillen: I thought they were in evidence already. I thought the Court just admitted them.

The Clerk: No, this is a different page.

Mr. Gillen: Same objection. Also the further objection that the witness expresses uncertainty as to whether or not it was the motorcar involved in the accident.

The Court: They are admitted.

(Defendant's Exhibits D-1 to D-5 in evidence.)

Q. (By Mr. Thompson): Calling your attention to Defendant's Exhibit D-4 in evidence, Mr. Jacobson, I will ask you to examine that picture; and it shows the brake rod about which you have testified, is that right? A. Yes, sir.

Q. Now, will you tell me how high is that or the distance between the top of the brake rod and the floor of the car, or measuring downward, how far downward the extension from [349] the bottom of the deck of the car to the bottom of the brake rod?

A. It is a space of about three-eighths of an inch.

Q. What is the diameter of the brake rod itself?

A. That is a seven-eighths inch rod.

Q. So the over-all distance between the lowest part of the brake rod and the bottom of the deck would be about what?

(Testimony of Alfred C. Jacobson.)

A. One and a quarter inches.

Q. Now, running parallel, is there an angle iron that extends across the car from side to side in close proximity to that brake rod?

A. Yes, sir.

Q. Would you give us the dimensions of that angle iron?

A. That is one and a half by two and a half angle iron.

Q. Which is the longer way of the angle iron, that which is bolted to the bed of the car or that which extends downward?

A. That which extends downward.

Q. With reference to the front or back of the motorcar, where is that angle iron placed, taking the front end of the motorcar, is it toward the front or is it behind the brake rod?

A. It is toward the front from the brake rod.

Q. It is how close to the brake rod?

A. About three and a half inches. [350]

Q. Now, will you give us the diameter of the wheels, can you, of the motorcar such as this was?

A. That motorcar carries wheels fourteen inches in diameter.

Q. And what is the height of the flange on the wheel?

A. Approximately, an inch and a quarter.

Q. What is the distance above the center of the wheels to the bottom of the deck of the motorcar, can you tell us?

(Testimony of Alfred C. Jacobson.)

A. Well, that is approximately an inch or an inch and a quarter.

Q. When the motorcar is on the rails such as on the main line, how much clearance is there under the motorcar to the top of the ties or ballast?

A. From fifteen to sixteen inches.

Q. That is, the closest clearance would be fifteen or sixteen inches above the ties or ballast, is that right? A. Yes.

Q. With reference to this wood that you found under the brake rod measuring from the flanges, how far would it have been in from those flanges, Mr. Jacobson?

A. From fourteen to sixteen inches.

Q. And again now, talking about the car, looking at the car going forward with the engine being considered as the front, where was the wood with respect to that, on which side, the left side or right side of the motorcar?

A. Facing in the same direction, sitting on the car and [351] facing toward the front of the car, it would be on the right hand side.

Q. And approximately fourteen to sixteen inches from the flanges, is that right?

A. That is right.

Q. Now, what is the width of the motorcar between the flanges?

A. Four feet, eight and a half inches.

Q. What is the gauge of the rails, Mr. Jacobson, do you know?

(Testimony of Alfred C. Jacobson.)

A. The gauge, well, four feet, eight and a half.

Q. So that would be measuring from the outside of the flange to the outside of flange?

A. That is right.

Q. The flanges are approximately how thick?

A. Approximately an inch.

Q. This stick you say was shown you by Mr. Ward which you say is portrayed in one of the photographs, what became of that, if you know, Mr. Jacobson?

A. I don't know.

Q. Where was it when you last saw it?

A. In the toolhouse at Willcox.

Q. What if any instructions were given with respect to it?

Mr. Gillen: Objected to as calling for hearsay.

The Court: You may answer, if you know. Tell what you [352] know.

A. I instructed that the stake and motorcar be locked up in the toolhouse.

Q. Did you give an instruction further than that for its disposition?

A. No, sir.

Mr. Thompson: I believe that is all.

Cross-Examination

By Mr. Gillen:

Q. Who specifically did you instruct to lock the motorcar that was represented to you by Mr. Ward as the car involved in the Schnee accident and the stick that was handed to you by Mr. Ward, to be locked up in the toolhouse?

(Testimony of Alfred C. Jacobson.)

A. It was either Mr. Ward or I locked it up myself.

Q. What?

A. Mr. Ward was there. It might have been Mr. Ward I instructed or I might have locked the tool-house myself.

Q. You answered a moment ago when the counsel asked you what instruction, if any you gave with regard to that stick, and you said, "I instructed that the stick and motorcar be locked in the tool-house"? A. Yes, sir.

Q. Now, I am asking you who you instructed?

A. Probably, I might have used the expression, "Let's lock it up and keep it here." [353]

Q. Is it your testimony now you didn't instruct anybody?

A. No, I am quite positive at that time Mr. Ward was there and I am quite sure he heard my expression, we wanted the motorcar and stick locked up.

Q. Mr. Jacobson, did you or did you not instruct someone to lock the motorcar and the stake in the toolhouse; if you did, I want to know who?

A. The only person I can recall being there at that time was Mr. Ward. I am pretty sure he was there and naturally, we wouldn't leave the motorcar out on the track or driveway, we would put it away in the toolhouse.

Q. Did you ever have that stick chemically analyzed? A. No, sir.

(Testimony of Alfred C. Jacobson.)

Q. Did you ever have anybody that knew wood to compare the splinters, the fibers I believe you call them rather than splinters, you found out on the tie compared by a person expert or experienced in wood, wood fibers and so on, compare it with the stick? A. No, sir.

Q. Is it my understanding of your testimony, outside of seeing the stick on August 30, 1946, at the toolhouse at Willcox you never saw it or had it in your hand again? A. That is correct.

Q. Sir? A. Yes, sir. [254]

Q. You considered that a very important piece of evidence, did you not?

A. I wasn't thinking of it as evidence.

Q. You knew the Claims Department would be on the job, did you not, with a man so badly injured as Mr. Schnee?

A. Naturally, and that is why we kept it there for his examination.

Q. You knew the Claims Department would want to know all about the details of it, anything that would throw any light on the accident?

A. Yes.

Q. What did you do with the fibers you found out on that tie, throw them away?

A. You mean the fibers that were in the tie?

Q. You saw those photographs with the circle around it? A. Yes.

Q. You saw that particular tie, did you not?

A. Yes, sir.

(Testimony of Alfred C. Jacobson.)

Q. When you were with Mr. Lyons, the Assistant Division Engineer? A. Yes.

Q. Are you the one that retrieved the fibers from the tie?

A. I didn't take all the fibers out of the tie.

Q. Did you take any of them out, one, two?

A. I believe I explored with a penknife to see if the fibers [355] protruded out of the tie.

Q. They were fibers, not splinters?

A. They were splinters of wood.

Q. How big?

A. They had the appearance of having been broken off the end of a stick.

Q. I asked you how large, how big?

A. The splinters, they had the appearance of being about an inch long and the hole was packed full of these splinters.

Q. How deep a hole?

A. I didn't explore to the bottom of the hole, but I would guess an inch or so.

Q. Inch or so deep? A. Yes.

Q. How many splinters?

A. It was practically filled.

Q. Did you count them?

A. No, I didn't count them.

Q. How round was the hole?

A. I wouldn't call it exactly round.

Q. What was the circumference of the hole?

A. The hole had the appearance of a pointed stick having been driven into the tie.

(Testimony of Alfred C. Jacobson.)

Q. I didn't ask you that, Mr. Jacobson. Will you please read Mr. Jacobson the question? [356]

(Question read.)

A. The hole might have been an inch wide, say from three-quarters to an inch wide and possibly three-quarters of an inch high.

Q. You and Mr. Lyons there alone at that time, is that correct?

A. I don't recall whether there was anyone else there or not.

Q. Did you have a photographer there?

A. Not the first time I was out there, no.

Q. The first time you were out there was the occasion with Mr. Lyons, is that correct?

A. That is correct.

Q. Did Mr. Lyons go over to the toolhouse with you at Willecox?

A. I can't be sure. I don't know. I can't remember that.

Q. Is it my understanding you went out on one occasion with a photographer?

A. Within an hour or two possibly after lunch, I don't recall.

Q. You went out with a photographer?

A. Yes.

Q. Located the same tie? A. Yes, sir.

Q. And took a picture? [357] A. Yes, sir.

Q. All right, now you consider that significant, and the Assistant Divisional Engineer considered it significant as an indication of something connected with the accident, isn't that correct?

(Testimony of Alfred C. Jacobson.)

A. I considered it significant.

Q. Yes. You saw the photographs that were finally taken? A. Yes, sir.

Q. Of that tie. Did you disturb the surrounding ballast to get that photograph?

A. It was crushed rock ballast. I don't recall disturbing it.

Q. You note in the picture the ballast is dug away from that particular portion of the tie?

A. Yes, sir.

Q. Did you do that or did the photographer do it in your presence?

A. I am under the impression that is the way we found the ballast.

Q. That is the way you found it?

A. Yes, sir.

Q. You noted in that picture, that picture shows the tie with a hole dug in it with no splinters or fibers protruding from it that are discernible, didn't you? A. No, I can see some fibers there.

Q. Can you? May we see the pictures? I would like you to indicate, if you would, whether there is anything in this tie but what appears to be a hole dug out that looks like freshly dug out of the side of the tie?

A. That white portion that can be seen there are the ends of the splinters that are broken off.

Q. The white portion that can be seen?

A. Yes.

Q. Is it not a fact that you took your penknife

(Testimony of Alfred C. Jacobson.)

and dug all of the fibers or splinters out of the tie?

A. No, sir.

Q. If Mr. Lyons testified he watched you do that he would be mistaken?

A. I used my penknife to assure myself——

Q. Will you answer my question?

Mr. Thompson: I object to that on the ground——
do what?

The Court: Go ahead and answer the question.

A. Yes, if he said I dug all the fibers out, I believe he is mistaken.

Q. Did you dig some of the fibers out?

A. Yes, I dislodged some of them to be sure the fibers were endways in the tie.

Q. What did you do with them when you dug them out?

A. I think there might be some laying here on the ballast; just dug them out to assure myself the fibers were endwise. [359]

Q. What did you do with the fibers you dug out?

A. I left them right there.

Q. I thought you said you took them back and compared them with the stick, to those in the stick?

A. I spoke about the splinters and stick on the underside of the motorcar.

Q. If Mr. Lyon testified you took those splinters with you, would you say he was mistaken about that?

Mr. Thompson: I object to that on the ground there is no such testimony.

(Testimony of Alfred C. Jacobson.)

Mr. Gillen: I will stand on the record.

The Court: Answer it again.

A. I think he would be mistaken.

Q. Was there any hearing held regarding this accident?

A. Not that I know of, that is a formal hearing I presume you are referring to?

Q. Yes, formal hearing such as is usually held in regard to an accident?

A. Not to my knowledge.

Q. You never attended a such hearing?

A. No, sir.

Q. You were called upon to state to the Claims Department or assist the Claims Department to the extent you had knowledge on the subject?

A. That is right. [360]

Q. That was Mr. Caldwell, I take it?

A. I recognize Mr. Caldwell as having seen him at that time. And I am quite sure it was him.

Q. By the way, you now reside at Oakland, California? A. Yes, sir.

Q. You were brought down here for this trial?

A. Yes, sir.

Q. You hold what position in Oakland?

A. Signal Supervisor at Oakland, the same as I had here at the time.

Q. Was any inquiry ever made of you about the whereabouts of the surveyor's grade stake by anyone?

A. Yes, I recall the question being raised; I

(Testimony of Alfred C. Jacobson.)

can't recall by whom. And I endeavored to have it located, but I was unable to.

Q. When was that?

A. Well, I believe it was possibly two or three weeks after the accident.

Q. When you examined the car that day and had the photographs taken of the motorcar, were you the one that caused the motorcar to be tagged?

A. I don't recall that. I can't recall it.

Q. Do you recall there was a tag put on the motorcar, "Schnee accident"?

A. No, I can't recall that. [361]

Q. Do you recall any request to have the motorcar forwarded from Willcox to Tucson?

A. Logically, those instructions would probably come from me.

Q. Mr. Jacobson, do you recall such a thing?

A. No, I don't recall.

Q. Do you know whether the car ever got to Tucson or not?

A. Yes, sir.

Q. How do you know that?

A. Because I looked at the car at Tucson again.

Q. When you looked at the car at Tucson, did it have a tag on it that said, "Schnee accident"?

A. I recall seeing a shipping tag on it. I don't know what it had on it.

Q. You didn't have that placed on or didn't instruct anybody to have that placed on?

A. I don't recall.

Q. That was equipment under your direct supervision?

A. Not direct supervision.

(Testimony of Alfred C. Jacobson.)

Q. You were boss of that whole Signal Department, weren't you? A. Yes, sir.

Q. You don't know why there wasn't a tag put on the grade stake, "Schnee accident," and why that wasn't forwarded with the motorcar, do you?

A. No, I don't.

Q. All you remember was some subsequent time someone whom you don't know inquired about the stake?

A. It was called to my attention the stake was missing.

Q. And you tried to find out something about it and couldn't? A. Yes, sir.

Q. How did you go about trying to find out something about it?

A. Well, sir, it is very vague in my mind just what we did. I can't recall it with certainty.

Q. You can't recall it? A. No, sir.

Q. Let me ask you this question: Is it not a fact on August 30, 1946, Mr. Ward was on vacation with pay, and Mr. Ward was packing and preparing to move to another section?

A. I don't recall whether he was on vacation with pay. He was packing to move, yes.

Q. Isn't it a fact that Mr. Ward informed you that he was leaving for another district and that the entire matter would be left in your hands as the boss of the Signal Department?

A. I think he was probably leaving at my instructions to another job.

(Testimony of Alfred C. Jacobson.)

Q. The question is: Isn't it a fact that he called you [363] since he was leaving, he would leave this evidence with you?

A. He may have, but I don't recall that.

Q. Was there any reason why you didn't take precautions yourself to tag that stake or bring it into your own office and lock it up?

A. The only reason would be that I expected additional investigations would be made on the grounds by others.

Q. You have been railroading long enough to know if there is such a thing as a broken grab iron or broken wheel, broken brakeshoe involved in a case or any piece of equipment broken, that is put away, cached away for the inspection and other use by the investigation forces of the railroad, isn't that so?

A. That is right.

Q. Do you know why such precautions weren't taken about the grade stake?

A. To my knowledge the grade stake was locked up in the toolhouse when I left there; I assumed it would be safe there and would be returned with the motorcar to the shop.

Q. You cannot tell us now who tagged the motorcar and sent it to Tucson?

A. I don't recall that, no.

Mr. Gillen: I think that is all.

Mr. Thompson: At this time, might the exhibits be shown to the jury. [364]

The Court: Better not now.

(Testimony of Alfred C. Jacobson.)

Redirect Examination

By Mr. Thompson:

Mr. Gillen: On Defendant's Exhibit C-1 and C-2, you have an arrow pointing in ink or a line showing that stick or stake which he says was exhibited to him by Mr. Ward—those are the exhibits for identification?

Mr. Thompson: No, those are the exhibits in evidence.

Mr. Gillen: No. If those are in evidence, they got past me, because I wished to be heard on that. I must have been asleep at the switch when these were offered in evidence.

The Court: I will hear you now.

Mr. Gillen: I offer an objection to the admission in evidence of Defendant's Exhibit C-1 and of Defendant's Exhibit C-2. I have no objection to Defendant's Exhibit C-3. My objection to the admission in evidence of C-1 and C-2 is that both pictures include in the photograph an object which has been partially identified as being a very important and vital exhibit in this case concerning which no proper showing has been made of the efforts made to obtain such exhibit, which would be the best evidence. I submit it is a violation of the best evidence rule without a showing of the impossibility of obtaining the particular original exhibit so that the Court might in its discretion or the Court to exercise its discretion to permit some

(Testimony of Alfred C. Jacobson.)

secondary evidence. The [365] importance of it also, may it please the Court, there has been some testimony of certain markings of certain chemical effects on the wood. I think it would be of vital importance to determine from seeing the original exhibit rather than depending on a photograph. I don't know whether Your Honor has in mind the particular two exhibits and the particular object. The objects in one instance are held in an unidentified person's hand because only the hand and arm shows; in the other exhibit it is propped up against apparently the axle under a motorcar which is standing on tracks. I would like Your Honor to see those.

The Court: I have no reason for looking at exhibits now. I haven't looked at any exhibits. They are admitted. Show them to the jury.

(Defendant's Exhibits C-1, C-2 and C-3 in evidence.)

Mr. Thompson: I have not yet offered Defendant's Exhibit G in evidence, which is the statement the plaintiff says he signed on September 3, 1946, about which the witness Caldwell and Mrs. Stevens testified.

Mr. Gillen: Without taking too much time of the Court, I want to offer the same objections I have two similar exhibits.

The Court: Same ruling, provisionally admitted. Are you through with this witness?

Mr. Thompson: Yes.

(Testimony of Alfred C. Jacobson.)

The Court: Do you want to question about the marking? [366]

Mr. Gillen: No, he just identified the stick with ink, Your Honor.

Mr. Thompson: If it please the Court, I think that concludes our witnesses with the exception the desire to ask a question or two of the plaintiff Schnee. Of course, I want the opportunity to inquire about these exhibits. I understood the Court hadn't yet permitted those to such an extent I can refer to the contents.

The Court: Defendant rests as to liability. You can begin your rebuttal when we come back in ten minutes, gentlemen.

(A ten minute recess.)

The Court: Proceed, Mr. Gillen. This is rebuttal on the question of liability.

ALMA TENDLER

called as a witness herein by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you state your name, please?

A. Alma Tendler, known as Bonnie as a nickname.

Q. What is your address, please?

A. 319 West Kings Road.

(Testimony of Alma Tendler.)

Q. In Tucson? A. Tucson, Arizona. [367]

Q. Are you employed, Mrs. Tendler?

A. Yes, sir.

Q. What is the nature of your employment?

A. I work for the City Laundry.

Q. In what capacity? A. In the office.

Q. Are you acquainted with Mr. Schnee, the plaintiff in this action? A. Yes, sir.

Q. Also with his wife, Mrs. Beatrice Schnee?

A. Yes, sir.

Q. How long have you known them?

A. Close to six years.

Q. Friendly with them all during the time they were residents of Tucson? A. Yes, sir.

Q. And when Mr. Schnee was working on the railroad? A. Yes, sir.

Q. Do you have a recollection of it coming to your attention on August 29, 1946, that Mr. Schnee had been seriously injured in an accident on the railroad? A. Yes, sir.

Q. At that time do you recall the Schnees had been living for a short time in Willcox by reason of his transfer there? A. Yes, sir. [368]

Q. Did you see Mrs. Schnee that night?

A. You mean the night of the accident?

Q. Yes.

A. Yes, sir, in the morning after she had come from the hospital.

Q. About what hour in the morning was that?

A. I would say, two or three o'clock in the morning. It was quite late.

(Testimony of Alma Tendler.)

Q. Did she remain at your house?

A. Yes, sir, she did.

Q. Throughout the time that Mr. Schnee was in the hospital, did Mrs. Schnee remain at your house?

A. Yes, sir.

Q. As a guest of your husband and yourself?

A. Yes, sir. She has a trailer parked on a lot there that was at her disposal.

Q. Following the 29th, did you at any time go to the hospital with Mrs. Schnee to visit Mr. Schnee?

A. Yes, sir. Not the first evening, but I believe the second evening after the accident, I went with Mrs. Schnee.

Q. How often thereafter did you go with her?

A. Well, quite often, maybe every other day, sometimes every day. It all depended on the way my work was going; if I could go with her, I did.

Q. For the first three weeks, can you tell us what if [369] anything during the visits you made there as you have described it, sometimes every other day and sometimes every day, for the first three weeks, can you tell us what if anything you observed about the condition of Mr. Schnee physically and mentally?

A. At first Mr. Schnee didn't know me at all.

Q. Didn't know you at all? A. No, sir.

Q. How long had he been acquainted with you up to that time?

A. From the time we were in Tucson which was about five years—no, we were here six years. He

(Testimony of Alma Tendler.)

had known me at least three years at the time of the accident I mean.

Q. For the first while he didn't know you. How long would you say that continued?

A. I know I made three, maybe four visits or more to the hospital before he seemed to recognize me, and after that there were times when he wasn't too sure, I don't believe, there was someone there.

Q. Can you tell us what gave you that impression? Is it anything he said or did or anything in the way he looked that gave you the impression there were times after that he didn't appear to recognize you?

A. At first he just laid there more or less. He was completely bandaged. I always said I could only see his nose. That is all I saw practically and he didn't make any [370] observations.

Q. Didn't talk? A. Didn't talk.

Q. Did he make any sounds that indicated anything to you at all?

A. He would sort of groan like he might have been in pain at different times.

Q. Was there anything else about him that caused you or that indicated anything to you about his condition either physically or mentally?

A. No, only he didn't remember all the time even after he knew us. Sometimes she would say something, then maybe five minutes or so he would ask that same question over again.

Q. Now, do I understand you that you would tell

(Testimony of Alma Tendler.)

him something or answer a question of his and about maybe five minutes later he would ask you for the same information again? A. Yes, sir.

Q. Is that so? A. Yes, sir.

Q. How long, if you can tell us, did that continue with regard to the mental aspect of Mr. Schnee?

A. Well, I wouldn't like to say a definite time.

Q. Your best recollection. Tell us if it is your best recollection?

A. It would be over a period of time, say, about three or [371] four weeks, maybe longer than that.

Q. Three or four weeks and maybe longer than that? A. Yes.

Q. What did you note about his physical appearance other than what you described, his head was swathed in bandages and you only could see his nose; what else did you observe about his physical appearance? Did you observe any other part of his body?

A. Well, after we had been there a number of times, of course, we looked at the cast on his leg and his hand, things like that, but I didn't do that at first.

Q. Then, after three or four weeks there, did you notice any change in his mental capacity?

A. Well, he seemed to know us then and to talk more freely.

Q. Did he appear to have greater or less pain or any at that time?

(Testimony of Alma Tendler.)

A. He didn't appear to have more pain.

Q. And do you recall his being transferred from St. Mary's Hospital to the Southern Pacific Sanatorium?

A. Yes, I do.

Q. Did you visit him there also?

A. Yes, sir.

Q. By the way, during the first couple of weeks you visited there with Mrs. Schnee, what if anything did you observe Mrs. Schnee do on those visits with relation to Mr. Schnee? [372]

A. She didn't do much of anything only go by his bed and sat there, maybe hold his hand, something like that. Of course, I didn't stay in the room all the time. I would go in the room and stay for a little bit, go back out again, sort of give them a little privacy.

Mr. Gillen: I think you may cross-examine.

Mr. Thompson: No questions.

MRS. BEATRICE SCHNEE

called as a witness herein by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you state your full name?

A. Mrs. Beatrice Schnee.

Q. You are the wife of the plaintiff in this action, A. J. Schnee?

A. That is right, sir.

(Testimony of Mrs. Beatrice Schnee.)

Q. How long have you and Mr. Schnee been married?

A. Since August 10, 1943—it was July, I am sorry.

Q. Mrs. Schnee, directing your attention to August 29, 1946, where were you residing at that time?

A. Willcox, Arizona.

Q. Did it come to your attention on that date your husband had been injured in a railroad accident?

A. Yes, sir. [373]

Q. And did you see your husband in Willcox that day?

A. Yes, sir.

Q. Where did you see him?

A. I saw him in front of the doctor's office in Willcox just before they put him in the ambulance.

Q. Did you know whether he was conscious or unconscious?

A. Well, he was semiconscious, I would say. By that I mean, well, he recognized me then.

Q. He recognized you?

A. Yes.

Q. Did you follow the ambulance to Tucson?

A. Yes, I did.

Q. Approximately what time of day did you arrive in Tucson?

A. We arrived in Tucson about nine that evening.

Q. Nine o'clock at night?

A. That is right.

Q. Where did you go?

A. Went to the Southern Pacific Hospital.

Q. Went to the Southern Pacific Hospital?

(Testimony of Mrs. Beatrice Schnee.)

A. That is right.

Q. What if anything happened there?

A. When I got there, they were getting ready to take him to St. Mary's Hospital.

Q. Do you know why?

A. I don't know whether it was a doctor or interne that [374] told me they didn't have facilities to take care of him, they were taking him over to St. Mary's and wait for Dr. Francis to meet them.

Q. Dr. Francis was the Southern Pacific Surgeon? A. That is right.

Q. Did you know Dr. Francis up to that time?

A. No, sir.

Q. Did you follow the ambulance to St. Mary's Hospital? A. That is right.

Q. Arriving at St. Mary's Hospital, what if anything did you do?

A. The first thing I did the nurse had me sign the register admitting him, also authorize Dr. Francis to do any work.

Q. Had you sign authorization for surgical care?

A. Yes, that was in on that form.

Q. Then, what happened?

A. Then, it was just a question of waiting. There wasn't much else to be done.

Q. Was your husband taken to surgery?

A. That is right.

Q. Where did you wait?

A. Outside in the anteroom.

Q. Outside the surgery? A. Yes.

(Testimony of Mrs. Beatrice Schnee.)

Q. At any time under any circumstances were you taken into the surgery? A. Yes, sir.

Q. Who brought you into the surgery?

A. Dr. Francis.

Q. Was there anything said about his admission into surgery?

A. Dr. Francis came out to me and said, "Mrs. Schnee, your husband is calling for you; I think you ought to come in, and I think it would be best you do." I went in and stayed a few minutes, and he said, "Now, you have to leave." That is all.

Q. How long, if you know, did Dr. Francis work on him in surgery that night?

A. The best I can remember so far as time goes, it was probably about ten o'clock when we got to St. Mary's and it was after one when they wheeled him by me out of the operating room.

Q. Did you go into his room with him?

A. I went up to his floor and they made me stay outside until they got him in bed and the nurse said when they got him in bed, they would let me come in.

Q. Did you see him after they got him in bed?

A. Yes.

Q. Was he conscious or unconscious?

A. Unconscious.

Q. What did you do?

A. The nurse said, "You can stay here a few minutes; the best thing you can do is leave." He was in an oxygen [376] tent. He was apparently

(Testimony of Mrs. Beatrice Schnee.)

out, no movement, perfectly still, just laid there and I left shortly after that.

Q. Did you notice anything about an oxygen tent at that time?

A. Oh, yes, he was under an oxygen tent.

Q. What time did you leave the hospital?

A. It was about 2:30 or 3:00, somewhere in there.

Q. Did you receive any instructions or advice from anybody about when you might next visit your husband?

A. Yes, the nurse told me to call in the morning, preferably about nine o'clock and for me not to come to the hospital; told me it wouldn't be of any use, and he would be in that kind of condition, they didn't know how long, and the best thing was to call and they would let me know when I could see him, which I did the following morning.

Q. When you did call, what information did you receive by way of instructions when you could see him?

A. Naturally, I asked about his condition and they said it was the same and I shouldn't come and should wait until maybe evening.

Q. That was on August 30th, you received the information his condition was the same and not to come until evening.

A. That is right.

Q. Did you call again in the evening?

A. No, I didn't, I went right out there. [377]

Q. Were you accompanied by anyone at that time?

(Testimony of Mrs. Beatrice Schnee.)

A. Yes, an old friend of ours, Mr. Myart, went with me.

Q. Is he a man whose family resides here?

A. Yes, sir.

Q. His wife and son reside in Tucson?

A. Yes, sir.

Q. When you arrived there at the hospital in your husband's room, what if anything did you observe?

A. Mr. Myart is an excitable man; as soon as he got to the door he started to cry, and he said, "Oh, my God, that poor boy." The first thing I saw was the cast on his legs and the oxygen tent. By that time the nurse came and pulled us away from the door and gave us a good dressing down for making a scene and told us to leave.

Q. Were you permitted to visit your husband?

A. No, she wouldn't allow it. She told us to leave.

Q. When did you next see your husband?

A. That was the following day.

Q. August 31st? A. That is right.

Q. What time did you go to the hospital that day? With whom, if anybody?

A. I went about 1:00 o'clock, time for visiting hours, whatever the time was. I don't remember now, but it was the afternoon. They had given me a card stating what the [378] hours were, and I know I got there before visitors were allowed upstairs and I sat in the anteroom. I was alone then.

(Testimony of Mrs. Beatrice Schnee.)

Q. Did you finally get up to your husband's room? A. Yes.

Q. In what condition did you find him at that time?

A. About the same. He wasn't conscious of me and I went over to his bed. I just sat down and just looked at him. There wasn't anything I could do or to say to him. They told me just let him know you are here. I went over to him and said, "I am here. This is Beatrice, honey," and he just turned over and looked at me and that was all.

Q. Did you see him any more that day?

A. Yes, I went out that night.

Q. With whom?

A. I think Bonnie went with me that night.

Q. By Bonnie, you mean Mrs. Tendler?

A. Yes.

Q. What did you observe about him that night?

A. I went over to the bed and sat down like I did in the afternoon and took his hand and sat there. Bonnie stood at the foot of the bed. He didn't seem to know we were in the room or anything. He looked and acted not coherently at all. He just laid there. I said to him that Bonnie is here; I remember he gave me a little pressure on the hand, that is all. Bonnie shook her head like this (indicating) to me, and [379] I sat there and later his hand seemed to try to tell me something. I took it and squeezed it and he just was lying there. It was pathetic. He couldn't do anything, just move his

(Testimony of Mrs. Beatrice Schnee.)

head a little bit, he was confined so with all these casts and bandages. He looked at me and smiled a little bit and that was the first time I think he realized I was there.

Q. When did you next see him?

A. The following afternoon.

Q. Did he talk on that occasion when he smiled?

A. The following day he did know I was there. He said, "Hello," if I remember correctly. He gave me some remarks, but the whole time I just mainly sat there and watched him, asked him how he felt. He naturally didn't say too much to me.

Q. For how long did that continue that condition you have described?

A. Well, as the days went on, he would know me and talk to me and ask me little questions now and then, but the following days he wouldn't know. I had even answered them.

Q. What days would you say that?

A. Well, for instance, he asked me where I was staying, something like that. I told him it is all right, I am at the trailer at Bonnie's. Then he seemed satisfied and he would go off like in a daze, asleep, then maybe that evening he would ask me the same question again, things of that sort. [380]

Q. Ask you where you were staying?

A. Yes.

Q. Can you give us any other examples that you can recall of that nature?

A. He did say one time, "It is a long trip from

(Testimony of Mrs. Beatrice Schnee.)

Willcox back and forth." I said, "Well, I am here in the city." He asked me if I was at a hotel, and I repeated again I was at Bonnie's. It went on, things of that sort. One time he asked me if I had gotten my things.

Q. Meaning what, if anything?

A. We had all our belongings up at Willcox, all our personal belongings and I had told him on the previous occasion I had gone up there and gotten my things.

Q. You had told him you had gotten your things? A. Yes.

Q. How many times did he ask you if you had gotten your personal things from Willcox after you had told him? A. Twice he asked me that.

Q. How long did the condition exist where he appeared to recognize you and would ask you questions, then appear to forget what answers you had given and ask you those questions over again?

A. I would say up to the time, it was eight or ten days, they removed the bandages; then, he had more freedom of his head and jaw muscles. [381]

Q. When they removed the bandages from his head? A. Yes.

Q. Can you give us an idea, if you have to use gestures to do so, how his head was bandaged?

A. The bandage came just a little above the eyebrows and down this way toward his chin. The reason for that the doctors informed me his scalp was so badly mutilated they kept it tight to keep it

(Testimony of Mrs. Beatrice Schnee.)

altogether, the stitches and everything. It was very tight around his jawbone here.

Q. You say approximately ten days after that, they removed the bandages? A. That is right.

Q. Of the head? A. That is right.

Q. Did the bandage and cast remain on the hand and legs? A. Oh, yes.

Q. When they removed the bandages, what change did you notice in his condition, if any?

A. It wasn't a case of me going over and trying to make him realize I was there. When I would walk in, he would see me and his eyes would focus, in other words, and he knew. That is the first thing I noticed when I walked in.

Q. Anything about his recollection or ability to carry on a conversation?

A. Yes, it was much improved. He didn't keep repeating [382] himself and asking questions over again as he had been doing up to that time.

Q. Was there any time you recall something was said about a special shampoo that you went out and bought?

A. Yes. One of the nurses told him about Minipoo, I believe it is. It is a dry powder shampoo.

Q. You were told by the nurse to get the shampoo? A. Yes.

Q. And did you? A. Yes.

Q. Do you recall anything about the shampoo being given?

A. Yes, because the afternoon after I bought it

(Testimony of Mrs. Beatrice Schnee.)

I walked in and the nurse had just finished because the preparation, the wash basin and towels were still around the bed, so she had evidently gotten through doing his scalp, cleaning it up.

Q. What did you notice about his condition on that day?

A. He was in a very good condition then, I would say. He spoke to me, he even joked a little bit and he didn't have any hair on his head and he did look quite comical, and he said, "Don't bring a mirror, I don't want to see it."

Q. His head had been shaved?

A. Yes, right around here (indicating) and it did look quite funny.

Q. How often would you say Mrs. Tendler visited the hospital?

A. You mean during the first week or all the time he was at [383] St. Mary's?

Q. During the first three weeks.

A. I would say she went on an average of three or four times a week with me, either in the evening or afternoon.

Q. You have a recollection of your husband having been transferred from St. Mary's to the Southern Pacific Sanitorium, do you remember such an occasion?

A. Yes.

Q. Can you fix the time?

A. It must have been before one o'clock.

Q. No, approximately how many weeks after the accident?

(Testimony of Mrs. Beatrice Schnee.)

A. Oh. I am trying to think. I know Dr. Francis didn't work on him for three weeks. Then, it took one operation at a time. I would say about four or five weeks, maybe six.

Q. How long, if you recall, did he remain in the Southern Pacific Sanitorium?

A. That was very short.

Q. How many days?

A. It was more than a few days, possibly a week or so, or two. I don't recall just exactly the amount of days it was.

Q. What, if anything, happened to him there that caused him to leave the Southern Pacific Hospital?

A. That was when the foot flared up. They took him then over to St. Mary's.

Q. Anything come to your attention about running any [384] temperature?

A. Yes, that was when they first got the indication the foot was flaring up. That is the indication, when it starts running a temperature, it is indication of infection. They called the doctors, of course, first and then took him to St. Mary's and they moved him in the evening because I was there when they brought him in.

Q. During the period he was at the Southern Pacific Sanitorium in Tucson, what did you observe about his condition with relation to pain or with relation to his being rational?

A. That was when his pain, I think, was really

(Testimony of Mrs. Beatrice Schnee.)

bad on that foot. There was a dispute over penicillin and it just seemed when he didn't get it—I know it was two days and the foot started swelling up right in the cast.

You could see all around and it was throbbing. You could put your hand on it; and they didn't keep any ice on it and he was in agony and pain. I couldn't stand to see him treated like that.

Q. When he was taken back to St. Mary's Hospital, how long did he remain a patient there that time?

A. He was there that night, he came there the following day and the next day he was operated on. About two or three weeks, maybe, I don't know.

Q. Was he subsequently transferred to the Southern Pacific General Hospital in San Francisco? [385] A. St. Mary's.

Q. I mean after his release from St. Mary's?

A. No, he was brought back to the Southern Pacific Hospital in Tucson.

Q. A second time?

A. Yes. From there he was transferred.

Q. To the Southern Pacific General Hospital in San Francisco? A. That is right, sir.

Mr. Gillen: I think that is all.

Mr. Thompson: No questions.

Mr. Gillen: That is all. I presume there will be no objection to Mrs. Schnee remaining in the courtroom now.

The Court: Yes, it was your request. She might have to be called again.

(Testimony of Mrs. Beatrice Schnee.)

Mr. Gillen: Very well, Your Honor, if there is any objection about it.

The Court: Nobody has made any objection. She may stay in the courtroom.

Mr. Gillen: I think, Your Honor, unless I have the stipulation of counsel that they be willing to stipulate she remained in the courtroom, I would rather she remain outside.

Mr. Thompson: I don't object to her staying here under any circumstances.

ADOLPH J. SCHNEE

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Mr. Schnee, you previously have been sworn and you are the plaintiff in this action. Yesterday you were shown three separate sheets of paper purporting to be statements made by you, one on August 30th to Mr. Wallace, one on—that is August 30th, 1946—one on September 3rd, 1946, purporting to have been made to Mr. Caldwell, and the third dated October 3, 1946, purporting to have been made to a Mrs. Stewart, if you recall, at the Southern Pacific Hospital. You were shown signatures which you identified as looking like yours and at least you don't challenge those as not being your signatures?

A. No, sir.

(Testimony of Adolph J. Schnee.)

Q. Let me ask you, during the time you were in St. Mary's Hospital in Tucson or the Southern Pacific Hospital in Tucson, what, if any, recollection do you have of having signed any papers of any character and what were those papers represented to you to be?

A. The first recollection I remember was this Mr. Caldwell, I believe he came in that very day; the reason I say the very day was because he mentioned of having been over to St. Mary's Hospital and that he didn't find me there, and he came down to get a hold of me. [387]

Q. Keep your voice up, please.

A. He came down to the Southern Pacific Sanatorium to see me, because he needed my signature on a little piece of paper about what they call an advance for money the company advances sometimes.

Q. That is for money the company advances for injured men during the time they are laid up, is that correct? A. Yes, sir.

Q. Now, do you have my question in mind?

A. Well, I am pretty sure this thing——

Q. Mr. Schnee, do you have my question in mind? I asked you what, if any, papers you signed, have any recollection of signing at either of the hospitals for anybody and what were the papers represented to you to be? You have told us about one instance you recollect; were there any other papers you recollect signing? A. Yes, sir.

(Testimony of Adolph J. Schnee.)

Q. What?

A. It was told to me that this paper—the lady came up to me. I don't remember the lady, but it appears I think I seen this lady that was in here this morning. I don't know, I am not too sure, but I remember a lady came in there and told me in transfers from one hospital to another, it is required for a patient to be admitted and upon that explanation she presented to me a piece of paper to sign, and I signed it. [388]

Q. Were there any other papers you recall signing for anybody at either of the hospitals and if so, what was represented by any of these papers?

A. Well, this Mr. Caldwell upon one occasion, it had to do with this same advance, he had me sign a slip of paper. He said it was needed for him to make a request to the main office.

Q. For him to make a request to the main office for what?

A. For this advance.

Q. For an advance of money to you from the Southern Pacific Company?

A. That is right. And when he did come that second time, he told me of difficulties. I believe I asked him, I needed a certain amount of money and he said he couldn't get me that much. That is the reason he had to make a change in the requisition. He needed to get the money.

Q. Did you sign several requests for money, for receipts for money?

A. Yes, sir. I don't know just how many of them; I know there were a few of them.

(Testimony of Adolph J. Schnee.)

Q. Do you have any recollection of seeing and making a statement to or for Mr. Wallace on August 30th or at any other time as to the details of how your accident happened?

A. I do not recollect making a statement to him at any time pertaining to the accident while I was in either St. Mary's Hospital or in the Southern Pacific Sanitorium. [389]

Q. Do you recall making a statement of the details of how your accident occurred in so far as you knew how the accident occurred to Mr. Caldwell at any time?

A. Not so far as I knew. I remember making the remarks to him from——

Q. I am talking about a statement, signed statement?

A. No. I don't recollect ever seeing that form that was shown to me, that typewritten page, I never even recollect seeing it.

Q. At any time during the time you have worked at Willcox or any other place as a Signal Maintenance man, did you ever use for the purposes of stirring the solution in batteries or for any other purpose in connection with your equipment a surveyor's grade stake?

A. I don't recall using a surveyor's grade stake. The fact is when I came there to take over this job, I used the same paddle that Mr. Wallace and I used together the first day he showed me how to build the very first battery on the job at Willcox, Arizona.

(Testimony of Adolph J. Schnee.)

Q. Did you use that same paddle throughout the period of time that you served in that capacity out there and up until the time you were injured?

A. Yes, most certainly did, sir.

Q. Now, will you describe the best you can what that paddle looked like? [390]

A. It appeared to me to have come off a crate, orange crate or some kind of fruit crate, and I don't just recollect how long it was. I don't think it was, oh, probably as long as my arm, maybe a little shorter.

Q. You are talking about your full arm or your arm up to your elbow?

A. From here to here (indicating).

Q. Your forearm? A. Yes.

Q. All right.

A. Maybe about two inches, two and a half inches, maybe three inches wide, say between two and three inches wide, and I couldn't say, maybe over a quarter of an inch, maybe less.

Q. Anything else about it?

A. I think it was whittled. It was narrow on one end, I believe, to facilitate the grasping of it.

Q. For a handle? A. Yes.

Q. Do you have any recollection of at any time carrying in your motor car either on the date of the accident or any other time a surveyor's grade stake for any purpose?

A. I never did and it would be unnecessary to carry a stick of that type on my job.

Q. On the occasion you discovered this defective

(Testimony of Adolph J. Schnee.)

signal where the lightning arresters were defective and you searched [391] for the parts you required to repair and reinstall the lightning arresters, did you when you went through your equipment in searching for the parts observe the presence of a grader's stake on your motor car?

A. A grader's stake?

Q. A surveyor's grade stake, I should say?

A. No, sir, I didn't have a piece of wood on the car that particular day, the day before, the day before that and probably days before that too, because I remember sending in a report to Mr. Wallace and Mr. Jacobson saying I had gotten through with building batteries and I was going out to inspect bonding, that is wires going from one end of the rail to the other, and cleaning the switches around each siding to make sure they are clear and make proper contact. In other words, I indicated this in my next report.

Q. In other words, you had caught up on your battery building work and was carrying no equipment pertaining to the replenishing or building of batteries on the day of the accident?

A. No, because it would be absolutely unnecessary and add weight to the car, carrying any equipment that goes with making of batteries, anything like that.

Mr. Gillen: You may cross-examine.

The Court: How far was the accident from this place you had been to? [392]

A. Willcox?

(Testimony of Adolph J. Schnee.)

Q. No, where you had been out there and found a broken connection?

A. About a half mile, quarter of a mile.

Q. You had about a half or quarter yet to go?

A. Yes, sir.

Cross-Examination

By Mr. Thompson:

Q. Will you mark this for identification?

(Defendant's Exhibit M marked for identification.)

Mr. Gillen: This is an application for employment. I don't know what effect it has on the liability, may it please the Court. I object to it as incompetent, irrelevant and immaterial. There is nothing in it that is material at all that I see.

The Court: Let us see what the questions are, Mr. Gillen.

Q. (By Mr. Thompson): Will you pass that to the plaintiff and I ask him to examine and tell me if that is your signature that appears on that document, Defendant's Exhibit M for identification? A. Yes, sir.

Q. When did you sign that document?

Mr. Gillen: The document speaks for itself. It is incompetent, irrelevant and immaterial. He hasn't challenged any other signature that has been shown to him here. [393]

(Testimony of Adolph J. Schnee.)

The Court: Answer the question, if you know.

A. The time when I first tried for a job.

Q. That was in July, 1946?

A. It was either the first day or two days before that or something.

Mr. Thompson: If it please the Court, we offer that part of the document that shows the signature, shows the specimen of the signature.

Mr. Gillen: To which we object. It is incompetent, irrelevant and immaterial. We have four or five signatures on purported statements which we haven't challenged.

The Court: It is admitted.

Mr. Gillen: Just the signature is offered then?

Mr. Thompson: That part of the document that has the signature.

(Defendant's Exhibit M in evidence.)

Mr. Thompson: I have no further questions.

Mr. Gillen: No further questions, Your Honor. That is all I am prepared to offer by way of rebuttal. There is one witness I would like to have the opportunity to locate, if it please the Court. We have made an effort to locate the party over the noon hour.

The Court: Any surrebuttal?

Mr. Thompson: I did want to cross-examine the defendant as to a question or two ultimately when the documents are [394] admitted, that is all I have.

The Court: Do it now.

Mr. Thompson: Then, I offer the exhibits conditionally at this time.

The Court: Do you want to do it with the defendant on the stand or do you want the plaintiff on the stand?

Mr. Thompson: I merely want the opportunity to read the exhibits to the jury. It isn't important whether the defendant is on the stand.

The Court: You rest on liability?

Mr. Thompson: Yes.

The Court: Subject to offering the exhibits?

Mr. Thompson: That is right.

The Court: Gentlemen of the Jury, come back at half past nine in the morning.

(Jury excused.)

Mr. Gillen: We have, Your Honor, some instructions we would like to put in order, instructions we intend to proffer.

Mr. Henderson: We also have a motion to renew, Your Honor.

The Court: State your motion.

Mr. Henderson: We renew our motion to the Court to direct a verdict in this case at the close of all the evidence that has been ruled on and the unconditional admissibility of the statements here. The motion is that at the conclusion of all [395] the evidence there still is no competent evidence here to prove beyond perhaps a mere scintilla which is not the rule in Federal Court, the defend-

ant has been negligent in any respect whatsoever.

The motion is divided into two parts; one of them is directed to the safety appliance part of the cause and on that ground there is no evidence whatsoever there was any violation of the Safety Appliance Act; the second portion is directed to the Federal Employees Liability Act and we say there is no competent evidence beyond the Scintilla Rule, of any inference there was any negligence on the part of the defendant here.

The Court: I want to accommodate you in this respect, Mr. Gillen, I assume you want to be heard on the admissibility of these statements?

Mr. Gillen: Yes, Your Honor.

The Court: Of course, you will want to be heard on this motion for a directed verdict. Do you want to be heard on those matters tonight or in the morning?

Mr. Gillen: I would rather, Your Honor, be heard in the morning.

The Court: On both of them?

Mr. Gillen: Yes, Your Honor.

The Court: Perhaps it would be fairer to you, as to the exhibits for you to speak tonight because I am inclined to [396] admit them. What I mean is, if you knew I was going to admit them that might make a difference in your argument for directed verdict.

Mr. Gillen: Yes, I understand.

The Court: I haven't read them. I didn't want to read them until I heard you fully.

Mr. Gillen: Yes, Your Honor; that is the reason why I wanted the opportunity if we can obtain this witness, to produce one more very short witness by way of rebuttal to attack the admissibility of the statements or at least part of the statements.

The Court: We will do it this way. I suggest we all come in at 9:00 o'clock. We will come in ahead of the jury and if you can produce the witness over night, we will hear him.

Mr. Gillen: May I make this suggestion, Your Honor? If I obtain the witness and produce him, he will be very short; my argument against the admissibility will be very short.

The Court: I think you had better figure, Mr. Gillen, that I am going to admit the documents. I know of no reason why I shouldn't. Their weight is another question. But if you have a witness at nine in the morning, we will wait until the jury comes at nine-thirty, but if your witness isn't here at nine in the morning, be prepared to argue the legal questions. [397]

(Whereupon a recess was taken at 5:00 o'clock p.m. until 9:00 o'clock a.m. Saturday, March 4th.)

(In the absence of the jury.)

Mr. Gillen: Your Honor hasn't ruled yet. I believe there was to be some further consideration.

The Court: You have another witness?

Mr. Gillen: I tried to reach the witness last night and this morning. Mr. Schnee is down at the phone trying to reach him.

The Court: I will admit these exhibits subject to the objection.

Mr. Gillen: I would like to be heard on it.

The Court: Yes.

Mr. Gillen: The jury not being present we can speak more openly.

(Arguments by counsel.)

Mr. Gillen: As to the first cause of action pertaining to the violation of the Safety Appliance Act, the plaintiff has the feeling that the evidence has failed to reveal anything that would bring his case within the realm of that act and for that reason we are quite willing at this time to stipulate to the dismissal of that cause of action.

The Court: Very well.

(Jury returns to the courtroom.)

The Court: You may read your exhibits and present your [398] pictures.

Mr. Henderson: Gentlemen of the Jury, we are reading to you at this time Defendant's Exhibits F, G and H, consisting of statements, the contents of which I will give you as best I can. Defendant's Exhibit G reads as follows:

Mr. Gillen: May I request counsel if he will describe the document as he goes along as to handwriting with reference to how it was testified to?

Mr. Henderson: All right, I will try to do it.

The printed part reads as follows: In one corner there is a little "10-36" and "S-3500," then "Southern Pacific Company Statement Relating To

Accident.....Tucson, ArizonaSheet
No. 1.....Statement of Adolph J. Schnee.....
Home address c/o S. P. Signal Dept., Tucson,
Arizona.....Occupation: Signal Maintainer....
Employer: S. P. Co.....Business Address: Tuc-
son, Arizona.....What day and what hour did
accident occur? August 29, 1946.....About
2:30 P.M.——”

The Court: Is it agreeable that the reporter
write in the material later?

Mr. Gillen: Yes, Your Honor.

The Court: He wants you to disclose who got
that statement and when?

Mr. Gillen: I had in mind this, in the body of
the [399] statement whether or not in handwriting
or the writing of Mr. Schnee. You heard Mr.
Caldwell went to the hospital on the afternoon of
the day after he was admitted and writing it and
showing it to him.

The Court: Is that the statement where Caldwell
made notes and took them home for his wife to
typewrite?

Mr. Henderson: Yes, this is the exhibit.

The Court: Was that the day after the acci-
dent?

Mr. Henderson: No, September 3rd, which
would be five days later.

The Court: All right.

Mr. Henderson: ——“Where did accident oc-
cur? About 2 miles East of Willcox. Where were
you when accident occurred? Riding motor car

(number unknown). Do you know anyone who saw accident? Please give names and addresses: No. Did you witness accident? I was injured. Give full account of your knowledge of accident: My name is Adolph J. Schnee, age 24, and I have been employed by the S. P. Co. in the Signal Department since July 1, 1946. When I first went to work for the S. P. Co. I was thoroughly instructed in the operation of the motor car by Mr. Wallace, Mr. Young, Mr. Bayless, and Mr. Curry. My duties as Signal Maintainer consist of maintenance of all automatic signal operations, [400] including recharging of storage batteries and upkeep of primary batteries and line circuits. On the morning before my injury I went East from Willcox, checking lightning and relay arresters, and returned to Willcox at noon time to have lunch. Just before one o'clock I took the motor car west as far as Hado to make my regular inspection, and then returned to Willcox and picked up the carbon discs and brass bushings and started east on the motor car to replace the lightning arresters at signal 107.72. I was traveling on the motor car, being the only person on the car, in an easterly direction and the motor car was headed west and was traveling at a speed of approximately 25 miles per hour, when, at a point approximately 2 miles east of Willcox, the accident occurred. Just before the accident occurred, I was facing in the direction of the movement of the car but was looking west watching the block signals at the east end of Willcox

as a train had pulled west out of Willecox. I was looking backwards and occasionally in the direction that the car was moving, just before the accident. I faintly recall a flash of seeing some sort of metal on one of the rails and then heard a clang and everything went black. I do not know what the piece of metal on the rail was and cannot describe it, as my recollection of this part of the accident is very vague. I do not know which rail this piece of metal was on nor the distance the car was from it when I saw it, and do not recall seeing it after the accident. I was unconscious for an [401] unknown length of time, and when I regained consciousness was lying some 20 feet from the tracks in the direction of the highway. I recall seeing the motor car on the same side of tracks that I was on, and some distance east, which I cannot estimate. I was unable to walk but crawled towards the highway. I heard one train pass by and crawled several hundred feet to the highway. A lady stopped in a car headed west, and she said for me to wait and she would get help. I did wait there, and some one came out from Willecox——”

Dated September 3, 1946.

/s/ ADOLPH J. SCHNEE.

Witness:

/s/ JOHN D. CALDWELL.

/s/ MARY JO RUSSELL, R.N.

Statement Relating to Accident

Tucson, Airzona.

Sheet No. 2

——“and picked me up in a truck. Before I was picked up in the truck, the sheriff from Willcox came out and said that he had been over to the tracks where the accident occurred. During the afternoon before the accident or the morning of the accident, I do not recall which, I rebuilt a battery on the east end and used a wooden stick which I had previously found in my outfit car, and this stick was $1\frac{1}{4}$ " x about $11\frac{1}{4}$ " and some $2\frac{1}{4}$ " long. Inasmuch as no paddle was furnished me for the stirring of the battery fluid, this was a clean stick and I used it to stir the battery fluid. After using this wooden stick I carried it in a trough on the right side in the [402] recessed part of the motor car. There is no clamp or other special place to keep this stirring stick on the motor car. There was no defect in the motor car (number unknown) which was involved in the accideint insofar as I know, but there were no scooters which are used to shove any obstruction clear of the track, on the rear of this motor car, and the ones in front of the motor car were either worn or of improper construction so they did not reach closer than one inch above the rail. I believe the sole cause of my accident was the piece of metal on the rail which caused the derailment of the motor car, rather than the derailment being caused by the stirring stick falling from the motor car. I do not know where this piece of metal came from which I saw on the track,

which caused my derailment. When I was injured I was traveling upgrade. My injuries consist of injured right foot, left knee, left hand, laceration of scalp, and two broken and one chipped teeth.

“/s/ I, Adolph J. Schnee, have read the foregoing statement of 2 pages and it is true and correct to the best of my knowledge and belief.

“Dated: September 3, 1946.

“Witness:

“/s/ JOHN D. CALDWELL.

“/s/ MARY JO RUSSELL, R.N.

“3467 So. Lundy Ave.”

That completes Exhibit G in evidence. Exhibit F in evidence, gentlemen, was the so-called Wallace Statement, taken the day after the accident, as you have heard from the witness stand, at St. Mary's Hospital, some time that afternoon and it is the so-called Form 2611 which you heard referred to here as Employee's Report of Accident. It is printed and there are several questions and answers. It reads this way:

“Division: Tucson. Nearest station: Willcox, Arizona. Name or No. of crossing: Nearest milepost: 1077. Date of accident: Aug. 29, 1946. Time of accident: 2:15 p.m. Clear, cloudy or foggy: Clear. Raining or snowing: No. Daylight, dusk or dark: Daylight. Kind of train: Train No.: Lds.: Mtys.: Tonnage in Ms.: Engine No.: Helper Engine No.: Direction: East. Speed: 25 M.P.H.

“Casualties to Persons

“Name and address: Adolph J. Schnee, S. P. Co., Signal Dept., Tucson. Age: 24. Sex: M. Married or Single: M. Nature and extent of injuries: Lacerated scalp, fractured ankle and left index finger and hand. Estimated days disability: 4 mo. Did you see the accident: Yes. Where were you when it occurred: On M-9 motor car, traveling east. [404] Detail of cause and circumstances: I was backing up motor car when I heard a clang like a piece of steel and that's the last I remember. I crawled to highway and hailed a car. They notified somebody in Willcox and truck came after me.

“Names and addresses of witnesses: No witnesses. Names and addresses of relatives or friends: Mrs. Beatrice Schnee, c/o Sig. Dept., Tucson. What was done with or for injured persons: Taken to Tucson in ambulance. By whose direction: Willcox doctor. Name and address of attending doctor: Dr. Francis. What did injured person or driver of vehicle say as to cause of accident:..... Who was present when statement was made: Could accident have been avoided: If so, how: Did any jerk or rough handling of train cause or contribute to accident: If so, explain fully: Main siding or yard track: Main. Straight or curved, right or left: Straight. Level, up or down grade: Level. In cut or on fill: Fill.”

Mr. Henderson: There are a lot of dashes, shall we just omit the rest of them?

Mr. Gillen: Yes.

Mr. Henderson: "Witness: /s/ M. O. Wallace. Dated August 30, 1946. Signed: Adolph J. Schnee."

Mr. Henderson: That completes Exhibit F. Exhibit II was only admitted partially. It was a statement taken of Mr. Schnee when he was transferred back to the Southern Pacific Hospital the first time.

"Southern Pacific Hospital Department—

Surgeon's First Injury Report.

"Station 48. Day: 10/3, 1946. Name of injured party: Adolph Schnee. Age: 25. Occupation: Signal Maintenance. Resident: Willcox. Married or single: Married. Habits: Employee, passenger or what: Employee. Date of accident: 8/29, 1946. Place: Willcox.

"1. Patient's statement as to manner of injury. If employee, state whether on or off duty: I was riding on a motor car. Motor car accidentally derailed.

"2. To what cause does patient attribute the accident and injury? If to negligence of anyone, whom? Or if to any defect in track, equipment, structure or appliance, what?

"Motor car derailed probably due to something on the track or something falling off car onto tracks.

“3. Names and addresses of witnesses: No witnesses.

“4. If insured, state how much and in what Company, and what weekly indemnity he is to receive, if any: No.

“5. Has patient previously been in good health: Yes.

“The foregoing is a true statement, to the best of my [406] knowledge and belief.

“Witness:

“M. Stewart.

“/s/ ADOLPH J. SCHNEE.”

Mr. Henderson: Then in writing, the signature “Adolph J. Schnee.”

Then, we have these photographs. I hand you the first two taken at the place of the accident. Mr. Lyons circled the place where the stick went into the tie.

(Photographs submitted to jury.)

Mr. Henderson: Defendant's Exhibits C-2 and C-1, which I am handing to the first juror, are pictures of the motor car itself and the designation by Mr. Jacobson, I think it was, of the broken part of the stick up under the car and an arrow pointing to the famous stick itself.

(Defendant's Exhibits C-2 and C-1 submitted to jury.)

Mr. Henderson: The rest of these photographs

are pictures of the car in various positions and showing measurements of the car.

Mr. Thompson: The last exhibit was the specimen of the signature admitted and only the signature. Does counsel have any objection to it being exhibited to them that way?

Mr. Gillen: Yes, we have never challenged that.

Mr. Thompson: Only the signature was admitted and is there any objection to handing it to them in that fashion?

Mr. Gillen: No.

Mr. Henderson: I hand you another exhibit which is [407] merely the signature of Mr. Schnee on his application for employment, for comparison with his signature on the three statements.

The Court: Do you have a witness, Mr. Gillen?

Mr. Gillen: I have some depositions and I have the plaintiff whom I would resume with.

The Court: All right, put him on.

ADOLPH J. SCHNEE

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Mr. Schnee, in your narration before this Court as to the sequence of events from the time you left on the fateful trip until the time you had crawled to the highway, I believe we had concluded the sequence of events at the point where you were

(Testimony of Adolph J. Schnee.)

picked up on the side of the highway, is that correct?

A. I believe I was saying something about being in the ambulance or in the room.

Q. That is right, you recall being moved and you thought it was in a dark room.

A. I don't recall whether it was an ambulance. I know it was dark in there and felt like I was being moved.

Q. Mr. Schnee, what is the next thing that you recall being clearly conscious of? I don't mean that day necessarily, the [408] first time that you felt that you clearly were cognizant of everything going on about you?

A. The first time I was conscious of my surroundings, things that were being said and people I remember seeing was on the very day that some sort of a shampoo was applied on my head and the scabs were being removed.

Q. From your head? A. Yes, sir.

Q. Whom did you see on that day that you were conscious of recognizing and talking to and so on?

A. I remember talking to my wife. I remember seeing my wife. I remember discussing the appearance of my head. I remember that the nurse was giving it to me and I recognized this nurse's voice in Court here the other day, but I don't remember her face. From that day on I had distinct recollections of my wife's daily visits. She visited twice

(Testimony of Adolph J. Schnee.)

a day, I can swear to that, I am swearing to it now. From there on she came twice a day, whenever possible and from visits the conversation brought out the visits before, succeeding visits, I mean that she referred to other visits and I wouldn't know what she was talking about.

Q. In other words, she would tell you things she had discussed on other visits and you had no recollection of discussing them with her?

A. Yes, I had occasions like that. [409]

Q. Let me ask you this: Were you conscious or do you have any recollection of the first surgical operation you underwent which I believe the record will show was on your hand, an open reduction on your left hand, were you conscious of that?

A. Yes, distinctly remember that for the reason that Dr. Francis told me, "Well, we think we can start working on you now and I think you are sufficiently out of shock."

Q. That you were sufficiently out of shock?

A. Yes, sir.

Q. May I have the St. Mary's Hospital Record, please? Now, you say you recall that first operation and Dr. Francis telling you he thought he could start working on you now because you were sufficiently out of shock, is that correct?

A. That is right, sir.

Q. Referring to Plaintiff's Exhibit 4, which is presumably the complete record, at least it has been

(Testimony of Adolph J. Schnee.)

identified as the complete record of your case from St. Mary's Hospital in Tucson, referring to page number five under the heading "St. Mary's Hospital and Sanitorium, Progress Record, Mr. John Schnee." I note the record shows over the doctor's signature "9/20/46, Open reduction of left second metacarpal with wire fixation of the fragments." That would be September 20, 1946. Does that assist you in recalling the first date of the surgical operation? [410] A. Yes, sir.

Mr. Thompson: Just a minute. Did you say in your question that was over the doctor's signature?

Mr. Gillen: Yes, the doctor's signature was on the page.

Mr. Thompson: It isn't over the doctor's signature, is it?

Mr. Gillen: The doctor has recited the same things in writing——

Mr. Thompson: The only statement was it was over the doctor's signature. As I understand, it is typewritten underneath. Do I understand you have offered this record and it is in evidence?

Mr. Gillen: It is so marked, if you remember the young lady from the hospital.

The Clerk: Yes, it is in evidence.

Mr. Thompson: All right.

Q. (By Mr. Gillen): My question in mind is that the approximate date, as you recall, that was the date of your first operation a little over three weeks after you were in the hospital?

(Testimony of Adolph J. Schnee.)

A. Yes, I remember definitely talking about it.

Q. Were you conscious of any subsequent operation, surgical operation being performed on you shortly after the open reduction and wiring of the hand?

A. After the hand, Dr. Francis told me to wait a week. [411]

Q. Wait a week?

A. Exactly a week, that is right, for an operation on my left knee or another operation on the right ankle, he said he didn't know which.

Q. He said he would do one or the other?

A. He said he would do one or the other depending on the condition. He had to remove the cast to find out the condition first.

Mr. Thompson: I object to that, without interrupting counsel constantly, the record is here and would be the best evidence. The conversation between this man and the doctor is objectionable.

Mr. Gillen: I agree the conversation would be hearsay, although the doctor was a company doctor and a representative of the Southern Pacific Company.

Mr. Thompson: If it please the Court——

Mr. Gillen: Call it hearsay, the record is here.

Mr. Thompson: ——The statement made he is a company doctor, if your Honor please, the Southern Pacific Hospital is operated by an association of employees and maintained from monies deducted from their pay. It isn't owned or operated by the Southern Pacific.

Mr. Gillen: The chief surgeon is appointed by

(Testimony of Adolph J. Schnee.)

the Southern Pacific and he appoints the staff members. We have been waltzing around with that a couple of years. [412]

Q. (By Mr. Gillen): The record indicates here that on September 25, five days after your hand operation, it was noted here, "open reduction of comminuted fracture of left patella with partial excision." Do you recall or do you have a recollection in your mind of having undergone that operation? A. Definitely.

Q. You were conscious and rational and knew that was being done at that time?

A. Dr. Francis was kind enough to explain to me——

Q. Don't say that, that is hearsay.

A. I am sorry. Yes, sir.

Q. You have just told what your mental condition was, have things recalled to you at that time, also what did happen to you. The record also shows you were transferred on October 3, 1946, from St. Mary's Hospital to the Southern Pacific Hospital; you have recollection of that, do you? A. Yes, sir.

Q. I notice Defendant's Exhibit H is dated October 3, 1946, and is on the form of the Southern Pacific Hospital at Tucson and is called, "Surgeon's First Injury Report."

I believe it will be stipulated, counsel, all the handwriting on this with the exception of the signature "Adolph Schnee," all other handwriting in-

(Testimony of Adolph J. Schnee.)

cluding the purported signature of Dr. Francis is the handwriting of Mrs. Stewart.

Mr. Thompson: That is correct, that is everything in [413] script is in her handwriting.

Mr. Gillen: Yes.

Q. (By Mr. Gillen): Do you recall signing any document upon your entrance to the Southern Pacific Hospital?

Mr. Thompson: Just a minute, if it please the Court. I understood in that phase of the case the witness was interrogated about this whole matter and gave his recollection or lack of recollection. I understand now it is to the medical phase.

The Court: I am not disposed to limit counsel. You can't draw too close a line.

Mr. Gillen: I am not going to prolong it in view of the previous interrogation and the jury having seen the statements.

The Court: Go ahead.

Q. (By Mr. Gillen): Did you tell Mrs. Stewart upon the date of your admission to the Southern Pacific Sanatorium upon transfer from St. Mary's Hospital, did you say this to her: "Patient was riding on a motor car. Motor car accidentally derailed. Motor car derailed probably due to something on the track or something falling off car onto tracks. No witnesses." Did you make any such statement to Mrs. Stewart at that time?

A. I do not recall making such a statement. As God is my witness I don't believe I did. I don't

(Testimony of Adolph J. Schnee.)

remember saying anything like that, yet I can see I might have, but as God is my witness I don't recall making such a statement. [414]

Q. Do you have any recollection of anything falling off your car? Did anybody suggest that to you?

A. That was what I was coming to. I was coming to the fact that during the course of Mr. Caldwell's visit up to St. Mary's Hospital, he at times talked about a statement he had gotten from me and he made references to it.

Q. Did you ask him to let you see that statement?

A. I don't recall whether I did or not, Mr. Gillen.

Q. Do you recall giving Mr. Caldwell a statement? A. I do not.

Q. Do you have any recollection of ever having told anybody you saw a piece of bright metal on the track and heard a clang of metal?

A. I don't recall ever saying that.

Q. Did you on the date of the accident see a piece of bright metal on the track and hear a metallic clang? A. I did not.

Q. You were transferred to the Southern Pacific Hospital and you remained there for some short period, did you? A. That is right, sir.

Q. Then what happened?

A. It wasn't but a couple of days my foot started bothering me, my right foot.

(Testimony of Adolph J. Schmee.)

Q. Describe what happened to your foot.

A. The foot swelled up. [415]

Q. Was the cast on the foot?

A. Most of it was on the foot, I believe it was split, some part of it on top removed. I know most of it was on there when it swelled up. The tightness of it began to tell and that was causing me a lot of pain.

Q. Was the pain severe?

A. I'll say it was.

Q. What happened then?

A. Dr. Francis was out of town and Dr. Schultz attempted, I believe, to get it under control by renewing the penicillin shots.

Q. You finally transferred back to St. Mary's Hospital?

A. Immediately after Dr. Francis returned, I think from a football game, he made arrangements for me and I believe I had to sign another piece of paper there for the coming operation or transfer, I don't know which it was.

Q. What happened then back at St. Mary's Hospital?

A. At St. Mary's Hospital I was operated on.

Q. Operated on in what part of your body?

A. The right ankle.

Q. Then, what was done?

A. Of course, then after that operation I stayed there and Dr. Francis attempted to get some movement in my left knee.

(Testimony of Adolph J. Schnee.)

Q. Get some movement out of your left knee?

A. Yes. You asked me before what occurred at the S. P. [416] Hospital. At that time they removed the cast on my left knee and that same day, or the day after, they removed the steel sutures on the outside of the knee, running from one side to the other. When they did that, they took me in the X-ray room and started on this job and at the same time attempted to take pictures of my right foot. They had the bed in there and two doctors, Dr. Schultz and another doctor; there were at least two or three nurses and my wife had come in there, not knowing the visiting hours and she first heard noises, that was the reason she came in there.

Q. You can't describe that?

A. I was lying in the bed with this one doctor working on my knee and pulling out the steel sutures; I was in such agony I actually got the bed sheet and bit into it. Mr. Caldwell held me down in the bed.

Q. You didn't have any anaesthetic?

A. No, sir.

Q. Can you fix the date?

A. I know it was immediately after I came from St. Mary's Hospital into the Southern Pacific Hospital.

The Court: What was the word you used, somebody held you down?

The Witness: He held my arm.

The Court: H-e-l-d, is that the word?

(Testimony of Adolph J. Schnee.)

The Witness: Held. [417]

Q. (By Mr. Gillen): Mr. Caldwell held you down?

A. And my father-in-law was on the other side on my arm.

Q. Now, Mr. Schnee, when you went back to St. Mary's, your foot was operated and Dr. Francis tried to develop any movement?

A. That is right.

Q. Were you operated any more in St. Mary's Hospital or any more in Tucson?

A. Not at any time.

Q. Was anything done about your hernia down here? A. No, sir.

Q. During the time you were in the hospitals in Tucson here, will you describe to the Jury what type of pain you suffered, if any? You have described one incident, but describe the pain you suffered from the various parts of your body that were injured.

A. My left knee was stiff and until the time they tried—of course, when they tried to get movement into it, then was when I suffered more pain than I ever did in my life. They had an orderly come in the therapy room and hold onto the top part of my leg while the nurse, I forget her last name, I think her first name was Lucy, while she attempted to get movement in this foot, and at times the pain was so terrific and that was the reason she would get this man to hold this part of my body down.

(Testimony of Adolph J. Schnee.)

Q. How long did that continue? [418]

A. That continued for a long time. It continued the last time I came back, this second trip after I returned from this operation on my foot to the S. P. Hospital again, from then on.

Q. Were you given any trouble from your foot?

A. The foot trouble has been with me constantly.

Q. What was the nature of any discomfort or pain you have had in your foot?

A. After that last operation on the foot I mentioned——

Q. I am not talking about the last operation, I am talking about from the very beginning. Were you conscious of any pain or discomfort in your foot?

A. From the very beginning the pain was such I had ice packs on there. I remember on several occasions I tried to get ice and they wouldn't have it on hand right away and the pain would be terrific; when the ice would melt and it would get warm.

Q. Was that sharp pain, dull, how? Can you describe the pain and can you describe anything different you have experienced?

A. I can say I have never had any sharp pains at any one particular spot, but it was a pressure from the inside in the ankle that was there constantly, and some of it has been with me ever since. It is like when I sprained an ankle before I was hurt, before you get it back in place it felt like it

(Testimony of Adolph J. Schmee.)

was sprained all the time. It feels like it is sprained now. [419] I want to move it and it feels like it is hooked on something.

Q. Do you have any discomfort from your head and do you retain any discomfort from your head?

A. At the very time I described at the time my wife came in there with the shampoo, I remember that then I had a pressure, a dull pain in my head, and after that I had big welts on it. When they wore down and the surface got more or less flat, I didn't have that pain any more. Lately I haven't experienced any of that except on occasions I get a sharp pain but it doesn't last long, maybe two seconds, maybe eight seconds.

Q. How often does that come?

A. It doesn't come often. It doesn't come any set time. I haven't had any now for a couple or three weeks. But before that, about three or four months ago, I used to get them more often, but I don't any more.

Q. What part of your head did you indicate?

A. I get them on both sides, on this side and the other side, and I do experience relief by putting my hand on it, incidentally, and applying pressure.

Q. Applying pressure to it?

A. That is right.

Q. Do you have ridges on your scalp and skull?

A. Yes, sir.

Q. Indentations? [420]

A. Yes, sir.

(Testimony of Adolph J. Schnee.)

Q. Can they be felt by palpation, by rubbing your hand over the head?

A. You can put your fingers on it and feel it.

Q. I don't know whether Your Honor will permit of that, but it is available for the Jury to feel the man's head. Your teeth you lost, did you have any pain or discomfort from the teeth?

A. I had discomfort after I got my teeth, but before that for a long time I had difficulty talking and I have a distinct recollection of my jaw feeling like it was out of place for the longest time.

Q. Did it make any difference in your manner of speaking? A. I should say it did.

Q. Your teeth have been replaced by artificial teeth? A. That is right.

Q. Do you have any trouble with your hand, any appreciable trouble with your hand?

A. I don't have any appreciable trouble with my hand, other than performing a twisting motion, wringing out a towel or facecloth.

Q. What sensation do you feel?

A. I have a distinct dull ache right in here (indicating).

Q. Other than that, your hand doesn't give you any discomfort?

A. Oh, yes, when I walk on crutches and apply too much weight [421] on this part of my hand.

Q. Now, prior to the time you had this accident, did you wear glasses?

A. No, sir, I didn't wear glasses in my life.

(Testimony of Adolph J. Schnee.)

Q. When did you get the glasses?

A. I got the glasses while I was lying in the Southern Pacific Hospital in California, San Francisco.

Q. Why did you get the glasses?

A. I experienced a blurriness.

Q. Blurriness?

A. Yes, sir. At a distance people would wave hello to me at the other end of the room; with my glasses off I wouldn't know who they were.

Q. Did that come on suddenly or gradually?

A. Gradually.

Q. Gradually from the time of the accident?

A. Yes. It is worse now.

Q. With regard to your knee, do you have any discomfort with that knee and describe what discomfort you did have from the beginning.

Q. The discomforts were extreme and they are still there more than ever, I believe. I have especially discomfort when attempting to get up from a seat or when attempting to lift my foot this way (indicating). I can put my hand down and I can feel a crack. [422]

Q. What the doctor calls crepitation, grinding or cracking?

A. Yes, you can feel it.

Q. Do you have to balance all the weight of your body and walking activity on the left leg?

A. Well, other than the time——

Q. Other than the aid you get from crutches?

A. I attempt a lot of times to lean on my elbows or other knee.

(Testimony of Adolph J. Schnee.)

Q. You can't bear any weight on your right foot?

A. No, sir.

Q. Is your right foot still open and draining?

A. Yes, sir.

Q. Tell us about your right foot.

A. The condition of it at this time?

Q. Yes.

A. It is twisted through the inside and the heel is pushed in, it is more flat appearance in the back. All the right ankle is gone except the upper, just a part of it on the top. There is a big indentation here in the side with a hole, maybe an inch or an inch and a quarter; I don't know how deep it is.

Q. What discomfort have you had with that foot?

A. The discomfort as described before, just like the darned thing is sprained, still that way.

Q. Did you ever have any pain in that foot?

A. I had plenty of pain. I had what they call "flare-ups." [423]

Q. Will you describe those flare-ups and what caused them, if you know?

A. The drainage on the side with the big hole stops and the pus or whatever it is inside tries to come out somewhere else.

Q. Forms an abscess, in other words?

A. I guess you would call it that. It shows blue over on the other side.

Q. Like a boil?

(Testimony of Adolph J. Schnee.)

A. No, I don't think like a boil. It is all over an area.

Q. Does it swell? A. Oh, yes, sir.

Q. Then, what is done to relieve that?

A. It has been relieved by me just putting on a heat pack there, keeping a heat pack on it all the time, and it has been taken out with a big syringe, a needle, and I have to go down there sometimes. I went down there at the U. C. Hospital in California there every day for maybe a half a week and had a lot of trouble with it in between operations.

Q. Insert the needle and suck out the fluid?

A. Do that and cut part of the cast away and put a heat pack on it and go back and take some more of the cast off, and try to get me relieved that way.

Q. When you went to the S. P. Hospital in San Francisco, what, if anything, was done there in the way of surgical care?

A. I forget all the operations, what they were all about. [424]

Q. Prior to coming to Tucson for this case, how many surgical operations had you undergone on various parts of your body?

A. I think it was 21 or 22. I had to write them down and look it up in a book.

Q. Do you have some memorandum?

A. Twenty-first operation on the right ankle, that would be a bone graft, February 20th, this year.

Q. February 20th of this year was the twenty-first operation? A. Twenty-first operation.

(Testimony of Adolph J. Schnee.)

Q. That included all of your operations?

A. Yes, sir.

Q. Did you have some hernia operation to repair a hernia at the Southern Pacific Hospital in San Francisco?

A. That hernia was never discovered until July or August, somewhere in there of 1947, and they operated on the thing and it wasn't but, I think, nine months after I experienced trouble again and after checking, I found out the same one, I think about the same place.

Q. So you had two hernia repair operations?

A. Yes. They operated on it and discovered later on, shortly after that, it came back again.

Q. So you have a hernia now; you wear some sort of a support?

A. I do on occasion, but as long as I can sit down often enough I don't have too much pain with it. [425]

Q. Does that give you pain and trouble too?

A. It does, when I attempt to hang my foot down straight.

Q. Was there more than one operation performed on your foot at the Southern Pacific Hospital in San Francisco?

A. Yes. When we first came there in May, they operated on the right foot and they operated somewhere in August or September, and I think in November they operated on it again, and they operated on my left knee too, took out some steel sutures from the inside that time.

(Testimony of Adolph J. Schnee.)

Q. Now, how long in all were you hospitalized in the various hospitals prior to going to the University of California Hospital?

A. St. Mary's Hospital.

Q. And the Southern Pacific Hospital in Tucson and the Southern Pacific Hospital in San Francisco?

A. Yes, three, three hospitals.

Q. I say, how long were you hospitalized in all, approximately?

A. In all together?

Q. Not including the University of California.

A. You mean the extent of the hospitalization or period?

Q. The time you spent in hospitals in all?

A. About two months down here at St. Mary's Hospital, and altogether I guess about a month in the Sanatorium, the S. P. Hospital down here.

Q. You went back to the Southern Pacific Hospital—— [426]

A. Yes, I am taking it all in one; and the Southern Pacific Hospital in San Francisco. I guess altogether about ten months to a year.

Q. Under what circumstances did you leave the Southern Pacific Hospital in San Francisco, cease to be a patient in the Southern Pacific Hospital in San Francisco?

A. They told me I was no longer entitled to hospitalization.

Q. Did you receive any letter to that effect?

A. I did after I asked for it.

Q. Can you tell us what it was you were told

(Testimony of Adolph J. Schnee.)

that you had no further medical attention coming from the Southern Pacific Company? Can you tell us approximately when that was you were discharged from the Southern Pacific Hospital in San Francisco?

A. It was this year, this spring, sometime this spring.

Q. And I have the letter?

A. May or April.

Q. Was it in May, 1948?

A. No, it must have been 1949.

Q. Following your discharge from the——

A. 1949, May, 1949.

Q. May of 1949? A. Yes.

Q. Following your discharge then, from the Southern Pacific Hospital, at the time of your discharge what was your condition [427] with relation to your foot, was it still draining?

A. The foot had an open wound or hole in it and it was draining, was draining constantly, and I had especially requested any sort of hospitalization because it was paining me at that time; because sometimes the darned thing would form the proud flesh on it and wouldn't drain for maybe a day or two. I went down there and asked them to let me have some pain pills.

Q. That was the condition when you were released from the Southern Pacific Hospital in San Francisco? A. Yes.

Q. What did you do then to get yourself some surgical, medical aid?

(Testimony of Adolph J. Schnee.)

A. The minute I got that written request I went there to the U. C. Hospital because I had been there before and tried to get in it.

Q. Were you afforded an opportunity to get into the University of California Hospital?

A. I did with that written letter from the S. P. Hospital.

Q. When you showed them the letter from the Southern Pacific Hospital, they let you in the University of California Hospital? A. Yes.

Q. You went in there as a paid clinic patient, that is where you paid part of the charges? [428]

A. I was in there under the full rate.

Q. Full rate, what do you mean by that?

A. They determine the rate just for your bed and daily rate, by that they charge the medicine and everything else accordingly, operating room over that. In other words, if your rate is less than the operating room, the cost is less.

Q. How many times have you been an in-patient, that is in bed at the University of California Hospital and how many operations have been performed on you there?

A. Can I look it up? It is ten or eleven.

Q. Either ten or eleven operations on your foot?

A. Yes. I think it is eleven.

Q. Eleven operations on your foot?

A. Yes.

Q. Can you describe what they have been doing by way of operating on your foot?

(Testimony of Adolph J. Schnee.)

A. The first one, they took out all the bone that had deteriorated.

Q. Took out all the bone that had deteriorated?

A. They had to take out healthy bone too.

Q. Do you know whether or not there has developed this infection known as an osteomyelitis condition?

Mr. Thompson: I object to that on the ground it is calling for a conclusion of a lay witness.

Q. (By Mr. Gillen): All right. They took out affected bone, [429] is that correct?

A. Yes, sir.

Q. What, if anything, else did they do, if you know?

A. First, after they took out the bone they went in a second time to remove additional bone to allow it to form a granulated tissue for the bone grafts they had in mind.

Q. For bone grafts? A. Yes.

Q. By the way, did you go under general anesthetics on these occasions?

A. As I understand it, every time.

Q. You know whether or not you were put out?

A. Oh, yes.

Q. Rendered unconscious?

A. Yes. One time I had what they call nerve block. I don't know whether you call that a general or not.

Q. Where did they get the bone to use for bone graft? A. Took it out of my right hip.

(Testimony of Adolph J. Schnee.)

Q. Of course, they opened your hip to do that?

A. I'll say, yes, sir.

Q. Was that the nature of all the operations, so far as you know, the ten or eleven operations at the University of California up until February 20, 1950, cleaning out the tissue and putting in bone grafts?

A. Yes, sir. [430]

Q. Did those operations leave you with any discomfort, either before or after the ten or eleven operations, leave you with any pain?

A. I am in pain now, as far as that goes. My hip still doesn't feel right, have a little feeling in it.

Q. How about your foot?

A. My foot still feels it is sprained. That is the feeling I have in it right now.

Q. Do you have any record of the actual expenses you have been put to for medical care or surgical care or medicines, anything of that nature, in connection with your injuries that you have paid for yourself?

A. Yes, sir. I believe I put them with your papers.

Q. All right. May I have the envelope passed to the witness?

(Envelope handed to witness.)

Q. In the interest of time we will have those assembled another time and ask you about them. Let me ask you this: when you were working at the time you were injured on the railroad in 1946, what salary were you earning at that time?

(Testimony of Adolph J. Schnee.)

A. I wasn't earning a salary immediately.

Q. What pay were you getting?

A. I was self-employed.

Q. No, no. While you were working for the railroad, what was the rate of pay you were drawing, at the time you had the accident? [431]

A. At the time I had the accident, I think it was a dollar and twenty-three cents, somewhere around that, a dollar twenty-three an hour.

Q. What was your average monthly earnings?

A. The average—I didn't have at any time a full pay check, monthly pay check, so it would be hard to determine.

Q. You were paid at the Southern Pacific Company twice a month?

A. Yes. What I meant to say, Mr. Gillen, I had three promotions there in so short a time it made my pay scale different.

Q. On what rate of pay were you working at the time you had been transferred to Willecox? You had been there about ten days working before you were hurt?

A. At the rate of a dollar and twenty-three and a half cents an hour. I think it amounted to \$250 or thereabouts a month; that is without any overtime.

Q. Without any overtime? A. Yes.

Q. Have you been able to work at that or any other occupation since that time? A. No, sir.

Q. Have you earned any money since that time by employing yourself? A. No, sir. [432]

(Testimony of Adolph J. Schnee.)

Q. And that is, of course, since the 29th of August, 1946, is that correct? A. That is right.

Mr. Gillen: By the way, before we forget it, may I ask if counsel is willing to stipulate to the life expectancy of this young man. I have offered an instruction of life expectancy based on the recognized tables, at the same time not proving it I believe his life expectancy at his present age is forty years. The 1941 Standard ordinary mortality table, his life expectancy at 27 is forty years. When is your birthday? A. September 20, 1921.

Mr. Thompson: To make my position clear, I am willing to stipulate to any standard. I do not have the figures before me and would not stipulate to that amount, but if the Court states that is the standard.

Mr. Gillen: Based on any evidence he wishes to produce.

Mr. Thompson: We will state later whether or not it is admissible.

Mr. Gillen: It is always admissible, as I understand it, where permanent injury is involved.

Mr. Thompson: It isn't a case of death, it is a case where he be permanently and totally injured the rest of his life is the question.

Mr. Gillen: I think the medical men will tell you [433] something about that.

Q. Now, have you assembled your expenses you have incurred since that time? I thought you had them in your book there. I thought you kept notes as I directed you?

(Testimony of Adolph J. Schnee.)

A. The only one I have, I have with my wife and my income tax statement at my home in San Francisco.

Q. What is the present condition of the right foot with relation to whether it is healing, open and draining at this time? Just what is the condition of it at this time?

A. It is open, it is draining. I redress it myself, put clean dressings on and my wife gives me two shots of penicillin a day.

Q. Do you know what units of penicillin you receive daily?

A. It is four million units per CC. and there is in each——

Q. How many CC's of penicillin do you receive daily?

A. Two CC's, one in the morning and one at night.

Q. One CC. in the morning and one CC. at night, is that correct?

A. Yes.

Q. How is that administered to you?

A. It is administered in my side, buttock.

Q. With a hypodermic needle?

A. Yes, sir.

Q. Was your wife instructed on the use of a hypodermic needle in order to save you expenses in administering this? [434]

A. She was instructed in this when she started working with the bone graft, when I was able to have three weeks between operations; but first, when

(Testimony of Adolph J. Schnee.)

I went to the U. C. Hospital they had operations coming up there every week and I would stay right there.

Q. Now, you have intervening three weeks between operations and they have instructed your wife how to give you penicillin injections, is that right?

A. Yes.

Q. Is your hip open or closed where they took the bone for bone graft? A. No, it is closed.

Q. Did they have retained and preserved in a bone bank that bone they took from your hip?

A. They have taken the bone out and put it in a bone bank.

Q. That is a place where they keep the bone alive for grafting purposes? A. That is right.

Q. Like a blood bank? A. That is right.

Q. They draw on that for your operations?

A. That is what I understand. I don't know whether they still have any or not.

Q. When are you due to return to the University of California Hospital for further bone graft operation? [435]

A. It will be three weeks from February 20th.

Mr. Gillen: I think that is all with this witness at this time with this exception, if it please the Court, I didn't want to take up the time of the Court to show him his bills and expenses.

The Court: Gentlemen of the Jury, come back at 10:00 o'clock, Monday morning.

(Jury excused.)

Mr. Gillen: There is the matter of the deposition of Dr. Francis, who has left the practice with the Southern Pacific Company and is engaged in practice in Santa Rosa, California. The deposition of Dr. Francis was noticed, Dr. Francis having agreed to come without subpoena and give a deposition, was noticed and the notice was mailed to the counsel here in Tucson, present counsel. Notice was mailed on February 27th, noticing the deposition for 10:00 o'clock, March 1, 1950, at my office in the Mills Building in San Francisco, under the rules of civil practice; the deposition was taken by my associate, Mr. Golden; it was forwarded to the Court. I have been served this morning, although counsel did call it to my attention prior to that he would offer objection, we were served this morning with objection to the deposition based on the ground they did not have sufficient time to obtain counsel to appear. I might state to Your Honor at the time this matter was set in this Court and in [436] anticipation of Your Honor's arrival here, I was in a trial in a Jury matter in San Bernardino, California, and Mr. Schnee was confined to the University of California Hospital; and I might state to Your Honor upon learning the matter was set for trial that I communicated with Mr. Thompson's office. Mr. Thompson was out of the city and I talked to Mr. Henderson and explained my predicament to Mr. Henderson and asked if it would be agreeable providing we had permission of the Court for this case to be postponed for a day or two as there were some

depositions I desired to have before the Court. Mr. Henderson said he would see if he could obtain permission and advised me very courteously and promptly he was unable to obtain permission of his clients to do that, although since I have learned there was another Southern Pacific case that was ready to go. However, I then asked if I might have the stipulation from Mr. Henderson as to taking depositions. Mr. Henderson suggested I take the matter up with Johnson, Rickson, Freeman and Johnson in Alameda County, which was the firm originally appearing in the Northern District of California, to see if some arrangement could be arrived through that office of taking depositions by stipulation. I did that, Your Honor, and Mr. Freeman of that firm was very willing to accommodate everybody and anybody at the depositions but could not himself get authority from the legal department of the Southern Pacific, couldn't find the men to do it. So we went ahead the best we [437] could. I got Judge Goodman of our District who shortened the time on one notice for the taking of the deposition of the medical librarian of the Southern Pacific Hospital to get their record here. We sent this notice to counsel. It was mailed, as I say, on the 27th of February for a deposition to be taken on the 1st of March. Also we obtained an order from Judge Goodman and took the depositions of Doctor Inman, University of California Hospital, and Doctor Grigorieff also, who operated on this boy, and that deposition was attended by Mr. Freeman, Mr. Free-

man probably at the request of local counsel. Now, he is objecting to the deposition being admitted, the deposition of Dr. Francis, on the ground of the shortness of time to obtain counsel to set in for them. We submit, may it please Your Honor, under the circumstances we feel we should be allowed to have the vitally important testimony of the original surgeon who worked on this boy before the Court. It is prohibitive from the standpoint of expense and impossible to get Dr. Francis to leave his practice. He could do so with great reluctance. He is a pretty busy man.

Mr. Thompson: Your Honor, on that, of course, the first two depositions I knew about well before the deposition was to be taken and finally got someone to go over and appear in the deposition. We did have an appearance. We are not going to make any objection to those depositions. As to Dr. Francis, I did not learn the matter that his deposition was contemplated [438] until the morning of March 1st, so far as we are concerned. It came into my office late on February 28th while I was engaged in this trial. We were in the act of coming to this courtroom to engage in this trial when I learned it was to be taken in San Francisco. I had no opportunity to communicate with any attorneys to go over there and examine Dr. Francis on our behalf. This case has been pending in this Court a long time and counsel certainly had ample opportunity to take any depositions a long time before this trial was in progress. I think where the rule provides for a rea-

sonable time means what it says. Counsel is entitled to that and we shouldn't be faced with a deposition where we didn't have opportunity to cross-examine the doctor or bring out any additional facts regarding what he testified to.

I say sincerely to the Court, I always hate to take the position that is technical but we think the deposition is not admissible.

Mr. Gillen: May I say to Your Honor, the last time I pursued an investigation in this area concerning this case Dr. Francis was still, according to my information, practicing in Tucson and was attached to the Southern Pacific staff. It wasn't until after I learned this case was to be tried and had a representative of mine down here to engage in some work that we discovered Dr. Francis had left Arizona altogether and was practicing in Santa Rosa; didn't know that as a matter of fact [439] when I first talked to Mr. Henderson on long distance phone. As a matter of fact, my man was going to subpoena Dr. Francis and we learned that Dr. Francis had since moved his activities from Tucson to Santa Rosa.

The Court: There is no different subpoena power made in this type of case than any other case. I won't rule on that now, I will rule on it at the time it comes up.

(Whereupon a recess was taken at 5:00 o'clock p.m. until 9:30 o'clock a.m. Monday, March 6th.)

The Court: Gentlemen of the Jury, I have been hearing arguments of counsel in your absence as to legal liability in this case and in my opinion there is none, therefore I instruct you to return a verdict for the defendant.

I appoint Mr. Otis as foreman. The verdict is returned at my direction, gentlemen, so the responsibility is mine.

The clerk will read the verdict.

Judgment will be received and filed and judgment entered for the defendant. Gentlemen of the Jury, thank you for your service. You are now discharged from further service on this case. [440]

Certificate

State of Arizona,
County of Pima—ss.

I, Fred L. Baker, do hereby certify that I was duly sworn as official Court Reporter in the United States District Court, District of Arizona, and that as such official Court Reporter I attended the trial in the foregoing entitled causes; that I took down in shorthand all the oral testimony adduced, and proceedings had; that such shorthand was reduced to writing under my supervision, and that the foregoing typewritten matter contains a full, true and correct transcript of my shorthand notes so taken by me as aforesaid.

/s/ FRED L. BAKER,

Official Court Reporter.

[Endorsed]: Filed May 1, 1950.

CLERK'S CERTIFICATE TO
RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said court, including the records, papers and files in the case of Adolph J. Schnee, Plaintiff, vs. Southern Pacific Company, a corporation, Defendant, numbered Civ-486 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the civil docket entries and minute entries are true and correct copies of the originals thereof remaining in my office in the city of Tucson, State and District aforesaid.

I further certify that said original documents, and said copies of the civil docket entries and of the minute entries, constitute the entire record on appeal in said case, as designated in the Appellant's Designation filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Civil Docket Entries.
2. Record Transferred from Northern District of California, filed January 3, 1949.
3. Praecipe for Dismissal Without Prejudice,

filed June 23, 1949.

4. Defendant's Motion to Set, filed August 10, 1949.

5. Withdrawal of Praeipice for Dismissal Without Prejudice, filed August 15, 1949.

6. Plaintiff's Motion to Set, filed November 14, 1949.

7. Deposition of Adolph J. Schnee, filed January 9, 1950.

8. Praeipice for Summons, filed February 27, 1950.

9. Deposition of Henrietta Roher, filed February 28, 1950.

10. Deposition of Verne T. Inman and Paul A. Grigorieff, filed March 1, 1950.

11. Jury List, filed February 28, 1950.

12. Praeipice for Subpoena Duces Tecum to Custodian of Records, St. Mary's Hospital, filed March 1, 1950.

13. Deposition of Dr. J. Donald Francis, filed March 2, 1950.

14. Defendant's Objection to Deposition of Dr. J. Donald Francis, filed March 4, 1950.

15. Plaintiff's Requested Instructions, filed March 6, 1950.

16. Plaintiff's Additional Requested Instructions, filed March 6, 1950.

17. Defendant's Requested Instructions, filed March 6, 1950.

18. Minute entries of February 28, March 1, 2, 3, 4, and 6, 1950 (proceedings of trial).

19. Verdict, filed March 6, 1950.

20. Plaintiff's exhibits 4, 5 and 6 in evidence. (Plaintiff's exhibits nos. 1, 2 and 3 for identification are defendant's exhibits J, K and L in evidence.)

21. Defendant's exhibits A, B, C-1, C-2, C-3, C-4, C-5, D-1, D-2, D-3, D-4, D-5, F, G, H, J, K, L, and M in evidence; and Defendant's exhibits E and I for identification.

22. Judgment filed March 7, 1950.

23. Subpoena for Mrs. Bonnie Tendler, filed March 21, 1950.

24. Notice of Appeal to Court of Appeals, filed April 5, 1950.

25. Cost Bond on Appeal, filed April 5, 1950.

26. Designation of Record on Appeal, filed April 5, 1950.

27. Reporter's Transcript, Volumes I and II, filed May 1, 1950.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$7.20 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 10th day of May, 1950.

WM. H. LOVELESS,
Clerk.

By /s/ CATHERINE A. DOUGHERTY
Chief Deputy.

[Endorsed]: No. 12547. United States Court of Appeals for the Ninth Circuit. Adolph J. Schnee, Appellant vs. Southern Pacific Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed: May 12, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12547

ADOLPH J. SCHNEE,

Appellant.

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Appellee.

DESIGNATION OF RECORD

Pursuant to Rule 19 (6) of the Rules of Practice of the above-entitled court, the appellant hereby designates the following parts of the record as material to the consideration of the appeal:

- 1) Court Docket Entries.
- 2) Record Transferred from Northern District of California, filed January 3, 1949.

- 3) Minute entries (proceedings of trial).
- 4) Verdict, filed March 6, 1950.
- 5) Plaintiff's exhibits.
- 6) Defendant's exhibits.
- 7) Judgment, filed March 7, 1950.
- 8) Notice of Appeal, filed April 5, 1950.
- 9) Cost Bond, filed April 5, 1950.
- 10) Designation of Record on Appeal, filed April 5, 1950.
- 11) Reporter's Transcript, Volumes I and II.
- 12) Statement of Points.
- 13) This designation.

Dated this 15th day of May, 1950.

/s/ LESLIE C. GILLEN,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 19, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

Pursuant to Rule 19 (6) of the Rules of Practice of the above-entitled court, the appellant hereby states the points on which he intends to rely, as follows:

- 1) The District Court erred in directing a verdict against plaintiff and in favor of defendant.
- 2) The District Court erred in refusing to submit the case to the jury.

3) The District Court erred in holding that as a matter of law plaintiff was not entitled to recover.

4) The District Court erred in holding and ruling that plaintiff's injuries were not proximately caused by negligence of the defendant.

5) The District Court erred in entering final judgment in favor of defendant.

6) The District Court erred in directing a verdict for defendant upon motion of the defendant.

7) The evidence introduced at the trial was of such character that it clearly indicated and established that plaintiff was injured as the proximate result of defendant's negligence and for that reason the action of the trial court in instructing the jury to return a verdict in favor of the defendant and against plaintiff was and is contrary to the law and evidence.

Dated this 15th day of May, 1950.

/s/ LESLIE C. GILLEN,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 19, 1950.

[Title of Court of Appeals and Cause.]

STIPULATION

Come now the parties hereto by their counsel, Leslie C. Gillen, attorney for plaintiff, and Messrs. Knapp, Boyle, Bilby & Thompson, attorneys for defendant, and stipulate that subject to the approval of the court, the original exhibits in the above-entitled matter may be received and considered by the Court in their original form without the necessity of reproduction.

Dated this 3rd day of June, 1950.

LESLIE C. GILLEN,

EDWARD W. SCRUGGS,

By /s/ EDWARD W. SCRUGGS,
Attorneys for Plaintiff.

KNAPP, BOYLE, BILBY &
THOMPSON,

By /s/ [Indistinguishable.]
Attorneys for Defendant.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,

/s/ W. E. ORR,
United States Circuit Judges.

[Endorsed]: Filed June 8, 1950.



No. 12,547

IN THE

United States Court of Appeals
For the Ninth Circuit

ADOLPH J. SCHNEE,

Appellant,

VS.

SOUTHERN PACIFIC COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANT.

LESLIE C. GILLEN,

886 Mills Building, San Francisco 4, California,

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HERBERT CHAMBERLIN,

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FILED

NOV 11 1950

PAUL P. O'BRIEN,



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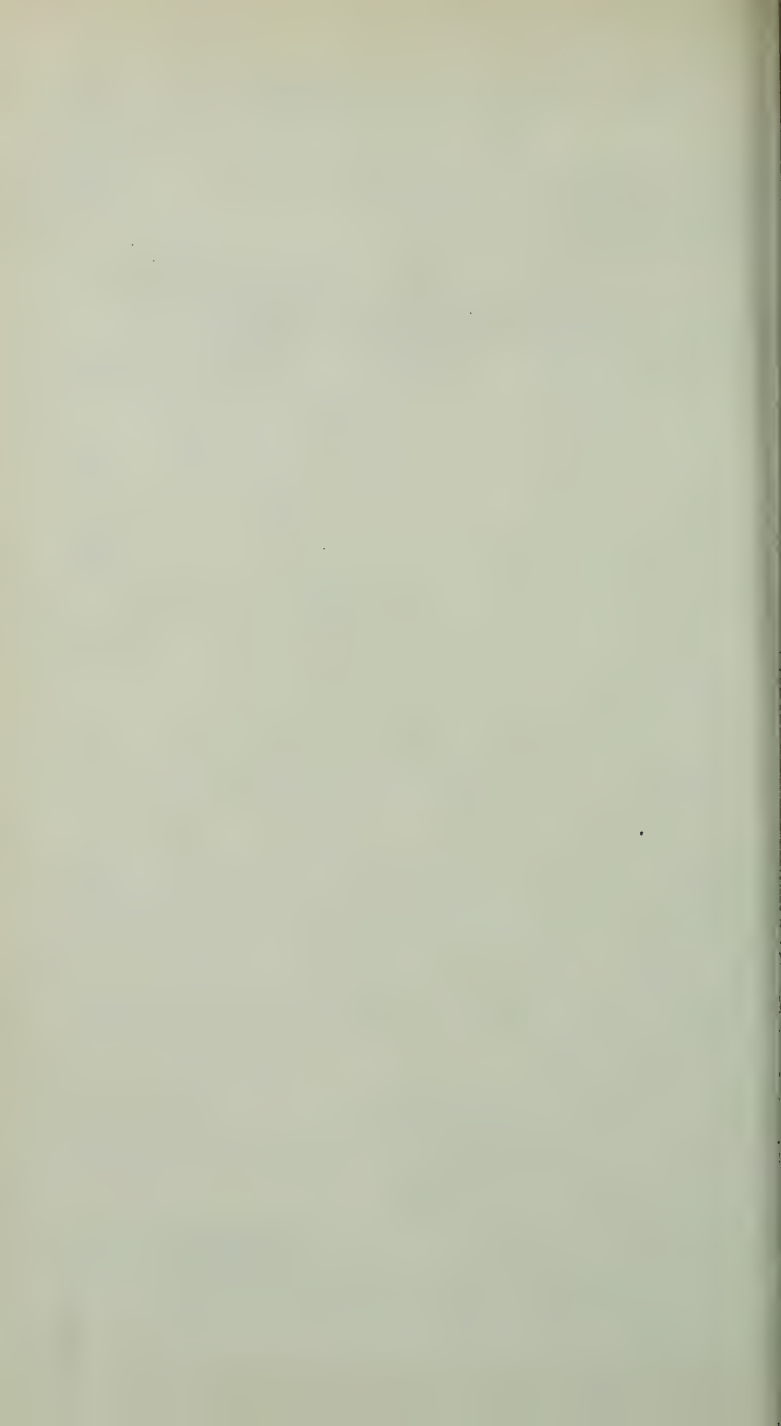
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No. 12,547

IN THE
United States Court of Appeals
For the Ninth Circuit

ADOLPH J. SCHNEE,

Appellant,

VS.

SOUTHERN PACIFIC COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANT.

The appeal is by the plaintiff, Adolph J. Schnee, from a judgment entered upon a directed verdict for the defendant, Southern Pacific Company, in a personal injury action.

STATEMENT OF JURISDICTION.

The complaint for personal injury damages of \$250,000 contained two causes of action, one based on the Safety Appliances and Equipment Act, 45 U.S.C., sec. 1, et seq. (T 8), the other based on the Federal Employers' Liability Act, 45 U.S.C., sec. 51, et seq. (T 11). The district court had jurisdiction. 28 U.S.C., Judiciary and Judicial Code, sec. 1331. Final judg-

ment was entered by the United States District Court for the District of Arizona March 7, 1950 (T 43). Notice of appeal to this court from the final judgment was filed April 5, 1950 (T 44). The appeal was timely. Rule 73 (a), Federal Rules of Civil Procedure. Jurisdiction of this court to review the judgment is sustained by 28 U.S.C., secs. 1291, 1294.

STATEMENT OF THE CASE.

By his complaint, filed January 8, 1948 (T 13) in the United States District Court, Northern District of California, Southern Division, plaintiff and appellant Adolph J. Schnee sought to recover personal injury damages from defendant and appellee Southern Pacific Company (T 7-13). The complaint contained two causes of action. The first cause of action was based on the Safety Appliances and Equipment Act, 45 U.S.C., sec. 1, et seq. (T 8). As the first cause of action was voluntarily dismissed at the trial (T 408) it need not be considered on this appeal. The second cause of action was based on the Federal Employers' Liability Act, 45 U.S.C., sec. 51, et seq. (T 11).

45 U.S.C., sec. 51, provides in material parts:

“Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or in-

sufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works . . . or other equipment.

Any employee of a carrier, any part of whose duties as such employee, shall be in the furtherance of interstate . . . commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce, and shall be entitled to the benefits of this chapter."

45 U.S.C., sec. 53, provides in material parts:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: . . ."

And 45 U.S.C., sec. 54, provides in material parts:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury . . . resulted in whole or in part from the negligence of any of its officers, agents, or employees of such carrier; . . ."

Either directly or by reference and incorporation the second cause of action alleged, in substance, that

on August 29, 1946, approximately 2 miles east of Willecox, Arizona, plaintiff was severely and permanently injured while employed as a signal maintainer in interstate commerce by defendant, a common carrier by railroad, when a motor car of defendant whereon he was riding left defendant's railroad track and roadbed whereon it was traveling (T 11-12). Negligence proximately causing the injury was ascribed to defendant as follows (T 12):

“that defendant carelessly and negligently failed to inspect said motor car and said track and roadbed and learn of their defective, insecure and insufficient condition and carelessly and negligently failed to provide a safe motor car and safe track and roadbed for plaintiff.”

In its answer to the complaint, defendant admitted it was a common carrier by railroad engaged in interstate commerce at the time plaintiff was injured and that plaintiff was employed by it in interstate commerce (T 14-16). Allegations of the complaint respecting negligence, injuries, and damages were denied by the answer (T 15-17). And the answer averred the special defense of contributory negligence and the special defense that negligence of plaintiff was the sole proximate cause of his injuries (T 17).

Pursuant to motion of defendant (T 22-24) an order was made December 3, 1948, by the United States District Court, Northern District of California, Southern Division, transferring the case to the United States District Court for the District of Arizona (T 27-28), where jury trial was commenced February 28, 1950 (T 48).

Before any evidence was offered by the parties at the trial, it was stipulated "as a proven fact that on August 29, 1946, at the time this accident occurred that Mr. Schnee, the plaintiff in the action was an employee of the Southern Pacific Company engaged in interstate commerce and acting within the scope of his employment as a signal maintenance man" (T 50).

Early in the trial the court ruled that the issue or "cause" of liability be first tried and evidence confined to that issue (T 66). At the conclusion of the evidence offered by plaintiff on the issue, defendant moved for a directed verdict on the following ground and the court ruled on the motion as follows (T 135-137):

"Mr. Henderson. We would like to make a motion for a directed verdict as of the close of plaintiff's case on the ground the case does not fall within the federal rule that the evidence has to be more than a mere scintilla, has to be more than a conjectural showing of negligence on the part of the defendant here. The specific motion is based on failure of proof and failure of any proof that will raise any reasonable inference on the part of this plaintiff which is sufficient to go to a Jury on the question of the defendant's negligence. * * *

The Court. I will hear you again at the conclusion of all the testimony on the question of liability."

Near the close of all the evidence on the issue of liability defendant renewed its motion for a directed verdict as follows (T 405-406):

“Mr. Henderson. We renew our motion to the Court to direct a verdict in this case at the close of all the evidence that has been ruled on and the unconditional admissibility of the statements here. The motion is that at the conclusion of all the evidence there is still no competent evidence here to prove beyond perhaps a mere scintilla which is not the rule in Federal Court, the defendant has been negligent in any respect whatsoever.”

Additional evidence on the issue of liability was thereafter offered by defendant and also by plaintiff in rebuttal (T 408-443). Additional arguments on the motion followed, and on March 6, 1950, the court granted the motion and directed a verdict as follows (T 448):

“The Court. Gentlemen of the Jury, I have been hearing arguments of counsel in your absence as to legal liability in this case and in my opinion there is none, therefore I instruct you to return a verdict for the defendant. I appoint Mr. Otis as foreman. The verdict is returned at my direction, gentlemen, so the responsibility is mine.”

As directed, the jury returned the following verdict (T 42):

“We, the jury, duly empaneled and sworn to try the above-entitled cause, do, by direction of the Court, find for the defendant.

Dated this 6th day of March, 1950.

/s/ Chas. W. Otis,
Foreman.”

And judgment for defendant on the directed verdict was entered March 7, 1950. Specifications of Error herein are addressed to the ruling of the court directing the verdict for defendant and to the judgment entered on the directed verdict.

The test which governs review of a directed verdict is well settled. It is thus stated in the recent case of *Ford v. Southwestern Greyhound Lines*, 5 Cir., 180 F. 2d 934, at page 935:

“The evidence must be viewed in the light most favorable to the losing party. Every inference that may properly be drawn from the evidence must be indulged against the instruction. If the record reflects any substantial testimony of probative force in favor of the losing party, same forbids a directed verdict. A peremptory charge is warranted only when the evidence is such that no other reasonable verdict can be rendered and the winning party is entitled, as a matter of law, to a judgment.”

See, also, 2 Barron & Holtzoff, Federal Practice and Procedure, 759-762, sec. 1075.

And the summary of the evidence which follows is made in the light of the rule stated in *Wilkerson v. McCarthy*, 336 U.S. 53, 57, 69 S. Ct. 413, 415, 93 L. Ed. 497, where, in reversing a judgment on a directed verdict for defendant in a Federal Employers' Liability Act case, the Supreme Court said:

“It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support

the case of a litigant against whom a peremptory instruction has been given.”

On August 29, 1946, the date he was injured, plaintiff was a signal maintenance man in the employ of the defendant (T 51-52). He was 25 years of age and had entered the employ of defendant on July 1, 1946 (T 51, 215). He worked out of Willcox, Arizona, which is approximately 85 miles railroad east of Tuscon, Arizona (T 52). His work schedule for August 29, 1946, required him to inspect and service a block signal about 2 miles railroad east of Willcox (T 59). For the discharge of his duties defendant had assigned to plaintiff a motor car which operated forward or backwards on the railroad tracks (T 55-56, 59). After his lunch hour, plaintiff left Willcox for the block signal, operating the motor car forward and railroad east on the north track of the main line of the railroad (T 57-59). When he reached the block signal he inspected it and found certain equipment defective and in need of replacement (T 59-61). He did not have the necessary replacement equipment on the motor car and he returned to Willcox to obtain it, operating the motor car backwards railroad west on the said north track (T 63-64). Having obtained the necessary replacement equipment at Willcox he again started for the block signal, operating the motor car forward railroad east on the said north track at a speed around 17 miles an hour (T 65-68).

Plaintiff had reached a point $\frac{1}{4}$ to $\frac{1}{2}$ mile railroad west of the block signal when the accident resulting in his injury occurred (T 403). As to what happened

at the time, plaintiff testified as follows (T 68-71): "I was sitting on the seat provided for the maintainer, which is on the left-hand side in this case facing east or facing with the front end of the car, east"; "I was watching the railroad signals"; "I was watching the horizon for smoke, which is also an indication for trains approaching"; "I was watching making sure that the track was clear"; "the sensation I had, the last sensation I had before I don't remember anything was a jolt, a jar, an abnormal movement of the car"; "It felt as though it was leaving the track or not running on the track just for an instant"; "it was merely this one instant I was conscious of"; "it was up more than sideways, instead of sideways movement. You generally always have a sort of a fishtail's movement"; "I think it something like coming up the other side of a dip in an automobile, you feel like you are going to stay up there"; "naturally I was sitting right on the car. It sort of came from the bottom, that is pressure, a sudden jolt caught me from the bottom like somebody pounding on this chair and lifting it up"; "it felt like (the car lifted)"; "I felt as though at the time that the instant I was sitting on the car there as though I was moving sideways or one way or the other. I felt a jolt coming from the bottom up, a lifting sensation"; "the (next) sensation I experienced (was) of arousing from a sleep"; "I don't recall anything between that and the last sensation I just described, that jolt"; "I felt as though I wanted to go back to sleep. I couldn't hear noises, that is, I felt by moving around I was moving in a

vacuum. I couldn't hear the noise I was making from disturbing the gravel, ground or bushes, whatever it was; that seemed strange to me. Also, my eyesight failed me quite a bit, everything looked blurry to me' (T 72).

From a "puddle of blood" at a point to which plaintiff was thrown by derailment of the motor car, plaintiff, terribly injured, crawled on his elbows or dragged himself a distance of 30 feet along the south rail back to the west; he then crossed directly over to the north of the north rail; and from there he crawled or dragged himself through grass and mud and under fences a distance of 900 or 1000 feet to within 5 feet of the shoulder of a highway where a passing motorist responded to his cries for help and summoned aid from Willcox (T 73-79, 82, 87-89).

The first persons to arrive at the accident scene were Dick Hallmark, the City Marshal of Willcox, and Richard Singleton, a miner, whom Hallmark asked to accompany him (T 80-85, 104-105). They were the first persons to see the motor car after the accident and the first persons to see the other indicia of the accident (T 105). They were able to retrace the movements and course of the motor car (T 85-86, 108).

Respecting the position of the motor car after the accident and its preceding movements and course, Hallmark and Singleton testified: The motor car, at rest, with its front end facing railroad east was entirely off the tracks and to the left or north of the

tracks (T 80-85, 104-105); the motor car had jumped the track a distance reflected by about 73 railroad crossties railroad west of where it was at rest (T 86); after jumping the track the motor car, going railroad east and straddling the north rail, angled up the track northerly a distance reflected by 60 to 65 railroad crossties (T 86); at that point the right wheels of the motor car came in contact with bolts holding the rails together and complete derailment of the motor car occurred (T 86-87); it traveled 25' to 30' more before it came to rest (T 87).

A short distance railroad west of where the motor car jumped the track a grade stake was found by Hallmark and Singleton (T 89, 108, 110). Respecting this grade stake Hallmark testified: Within a distance reflected by 4 railroad crossties from where the motor car jumped the track, a square grade stake ($1\frac{1}{4}$ " x $1\frac{1}{4}$ "), 15" to 18" long was laying south of the north rail (T 85, 90-91); the sharpened end of the grade stake appeared burred and small splinters were strewn along (T 90); it had oil on it (T 91); the small splinters were just south of the north rail (T 91). And respecting the grade stake Singleton testified: "The stick had been splintered, oh, for a space probably a few feet where the stake had apparently hit something. The splinters were laying along back; then we later found where it had hit and the trail of splinters ended at the stake" (T 109); there was a fresh abrasion on the side of the tie, slightly west of where the wheel marks started on the tie (T 115); fresh marks on the underside of the motor car indicated where some stake or instrument had hit the under-

side of the motor car and had apparently lifted the motor car, leaving splinters or an abrasion or a scarred place on the underside (flooring) (T 116); "The stake showed evidence of having hit something. One end of it was sheared or nubbed off and splinters were thrown from it for a matter of a few feet there" (T 117); the other end was slightly splintered (T 117); both ends showed evidence of having struck something (T 117).

In addition to the grade stake an iron brake hanger was found in the railroad roadbed at the accident scene (T 108, 142, 352); it was inside the rails and railroad west of where the motor car was at rest, but railroad east from the grade stake (T 114); it had the appearance of having been there for some time (T 115, 146, 353).

Turning to a brief description of the involved motor car the record shows the following: It weighed 495 pounds (T 156); it had 4 wheels, flanged for traction on the rails (T 52); between flanges the motor car was 4' 8½" wide (T 365); wheels were 14" in diameter (T 365); power was furnished by a gasoline engine on the deck or floor in the front part of the motor car (T 53, 164, 276); it could be operated either forward or backwards (T 54); to put the motor car in operation it was necessary for the operator to push it until the motor started and to then jump on (T 225); it was equipped with adjustable wooden handles at each end so that it could be lifted on and off the rails (T 156); clearance from the bottom of the deck or flooring to the top of the ties or ballast

was 15" to 16" (T 365); the motor car was completely open and all parts exposed below the deck or flooring of the motor car (T 53).

Finally, and turning to roadbed conditions and inspections, the record contains the following evidence: At the accident scene the rails were 39' long and there were 24 railroad ties to each rail (T 148); between rails the gauge was 4' 8½" (T 347); rails were 8" high and tied together with "sickle bars" with 4 bolts and fixed by spiking through the tie plate (T 347); ballast was of slag (T 347); at the accident scene the ballast was 6" lower than the ballast alongside it (T 339-340); day in and day out survey parties of defendant were constantly at work putting up grade stakes (T 171, 192); "they are put there for new surface to surface it to the stakes and center line stakes" (T 171); at times grade stakes, about 2' long, are put between the rails in the center of the track (T 172, 175); at times grade stakes are found lying on the ground along the right of way (T 172); defendant's section foreman was charged with the duty of patrolling the roadbed for such grade stakes or brake hangers and to pick them up and remove them whenever seen (T 169, 172); before the accident, on the day of the accident, two section gangs were operating in the area where the accident occurred (T 196-197); on the morning of August 29, 1946, a roadmaster in the employ of defendant made an inspection of the roadbed in the area which included the accident scene and did not see the grade stake or the brake hanger (T 188, 191-192); a division engineer who

made an inspection on the morning of August 29, 1946, including the area of the accident scene, testified, "Unquestionably I must have seen some grade stakes, but I don't recall any particular stake" (T 322-323, 343-344).

SPECIFICATION OF ERRORS RELIED UPON.

1. The District Court erred in directing a verdict for defendant upon motion of the defendant.

2. The evidence introduced at the trial was of such character that it clearly indicated and established that plaintiff was injured as the proximate result of defendant's negligence and for that reason the action of the trial court in instructing the jury to return a verdict in favor of the defendant and against plaintiff was and is contrary to the law and evidence.

3. The District Court erred in entering final judgment in favor of defendant.

ARGUMENT OF THE CASE.

THE DISTRICT COURT ERRED IN DIRECTING A VERDICT FOR DEFENDANT UPON MOTION OF THE DEFENDANT. (Specification of Error No. 1.)

The sufficiency of the evidence to support a judgment for plaintiff and appellant may be demonstrated by an application of the doctrine of *res ipsa loquitur*, or it may be demonstrated without application of that

doctrine. In this subdivision appellant undertakes both demonstrations.

(a) *Res ipsa loquitur*.

The scope of this doctrine in its application to Federal Employers' Liability Act cases is fully covered by the decision of the Supreme Court in *Jesionowski v. Boston & M. R.R. Co.*, 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 355. There, as here, a derailment case was involved. In holding the doctrine applicable it was there said (329 U.S., at pages 457, 458, 67 S.Ct., at page 404):

“Thus, the question here really is not whether the application of the rule relied on fits squarely into some judicial decision, rigidly construed, but whether the circumstances were such as to justify a finding that this derailment was a result of the defendant's negligence. We hold that they were. Derailments are extraordinary, not usual happenings. When they do occur, a jury may fairly find that they occurred as a result of negligence. It is true that the jury might have found here that this accident happened as a result of the negligence of the deceased; but although the respondent offered evidence to establish this fact, it ‘did not satisfy the jury.’ *Southern Ry. Etc. v. Bennett*, 233 U.S. at page 86, 34 S.Ct. at page 567. With the deceased freed from any negligent conduct in connection with the switch or the signaling, we have left an accident ordinarily the result of negligence which may be attributed only to the lack of care of the railroad, the only other agency involved. Once a jury, having been appropriately instructed, finds that the employee's

activities did not cause the derailment, the defendant remains as the exclusive controller of all of the factors which may have caused the accident. It would run counter to common everyday experience to say that, after a finding by the jury that the throwing of the switch and the signaling did not contribute to the derailment, the jury was without authority to infer that either the negligent operation of the train or the negligent maintenance of the instrumentalities other than the switch was the cause of the derailment. It was uncontroverted that the railroad had exclusive control of both. We think that the facts support the jury's finding both that the deceased's conduct did not cause the accident and that the railroad's negligence did."

And in *Johnson v. United States*, 333 U.S. 46, 48, 68 S.Ct. 391, 394, 92 L.Ed. 360, it was said:

"The rule of *res ipsa loquitur* applied in *Jesionowski v. Boston & Maine R. Co.*, supra, means that 'the facts of the occurrence warrant the inference of negligence, not that they compel such an inference.' *Sweeney v. Irving*, 228 U.S. 233, 240, 33 S.Ct. 416, 418, 57 L.Ed. 815."

In the present case, therefore, it cannot be denied that the derailment of the motor car was an extraordinary and not a usual happening. From the nature of the accident it accordingly follows that a jury could fairly find that the derailment occurred as the result of negligence. And from the evidence assembled in the statement of the case herein a jury could also

fairly find that the derailment did not result from any negligence of plaintiff and appellant.

The motor car which jumped the track was furnished and maintained by defendant and respondent. The tracks, rails, and roadbed over which it was traveling when it jumped the track were maintained, controlled, and patrolled by defendant and respondent. From the facts of the occurrence a finding or inference of negligence on the part of defendant and respondent was fairly warranted. The facts of the occurrence therefore entitled plaintiff and appellant to the rule of *res ipsa loquitur* and established a foundation of liability entitling plaintiff and appellant to have his case submitted to the jury. Error of the District Court in granting defendant's motion for directed verdict and directing a verdict for defendant is therefore demonstrated and requires a reversal of the judgment appealed from.

(b) Apart from *res ipsa loquitur*.

The Supreme Court has repeatedly affirmed and applied the rule that Federal Employers' Liability Act cases must go to the jury if there is any rational basis in the evidence for a plaintiff verdict. (*Wilkerson v. McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497; *Myers v. Reading Co.*, 331 U.S. 477, 67 S. Ct. 1335, 91 L. Ed. 1615; *Ellis v. Union Pac. R. R. Co.*, 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572; *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 421; *Tennant v. Peoria & P. U. Ry.*, 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Bailey v. Central Vermont Ry.*,

319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Tiller v. Atlantic Coast Line Co.*, 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Jenkins v. Kurn*, 313 U.S. 256, 61 S. Ct. 934, 85 L. Ed. 1316.)

Rational basis for a plaintiff verdict in this case is unmistakable from the evidence earlier assembled.

Defendant was responsible for the motor car furnished the employee. It was so constructed that in operation it swayed from side to side and was unstable on the rails (T 69-70). It was so constructed that a small object, such as a grade stake, pressing against or striking its underside or its parts below the floor or deck would cause its derailment. And it was so constructed that its underside and its parts below the floor or deck were open and exposed and susceptible of being struck by objects such as grade stakes.

Defendant was also responsible for the tracks and roadbed on or over which the employee operated the motor car. In the work of surveying and grading employees of the defendant used grade stakes. Sometimes they were driven or placed in the roadbed; sometimes they were driven or placed outside the roadbed. There was evidence that the length of these grade stakes exceeded the clearance between the open and exposed underside of the motor and the roadbed (T 53, 172-175). Certain employees of the defendant were charged with the duty of patrolling and inspecting the roadbed and removing therefrom such objects as grade stakes and brake hanger irons (T 172, 192-193). Sometimes

they discharged that duty; sometimes they did not (T 178). There was evidence that a brake hanger iron was on the roadbed at the time the motor car was derailed. It had been there 30 or 40 days (T 145-146). There was evidence that a grade stake was on the roadbed at the time the motor car was derailed. It was weathered and had oil on it (T 91, 151). At least two inspections made by employees of the defendant on the morning of the accident had failed to detect the presence on the roadbed of either the brake hanger iron or the grade stake. There was evidence that the grade stake found at the accident scene had struck or pressed against the open and exposed underside of the motor car and parts and caused the derailment. Two section gangs were working in the area of the accident scene at and before the accident. The use of a grade stake on the roadbed at the accident scene in anticipation of grading by them could reasonably be inferred, for the roadbed ballast at the accident scene was six inches lower than adjacent ballast.

From probative facts with which the record teems, the conclusion is therefore inevitable that rational basis for a plaintiff verdict is found in the evidence, amply supporting the allegations of the complaint (T 12) that plaintiff was injured because "defendant carelessly and negligently failed to inspect said motor car and said track and roadbed and learn of their defective, insecure and insufficient condition, and carelessly and negligently failed to provide a safe motor car and safe track and roadbed for plaintiff".

Apart from the doctrine of *res ipsa loquitur*, error of the District Court in granting defendant's motion for directed verdict and directing a verdict for defendant is therefore demonstrated and requires a reversal of the judgment appealed from.

THE EVIDENCE INTRODUCED AT THE TRIAL WAS OF SUCH CHARACTER THAT IT CLEARLY INDICATED AND ESTABLISHED THAT PLAINTIFF WAS INJURED AS THE PROXIMATE RESULT OF DEFENDANT'S NEGLIGENCE AND FOR THAT REASON THE ACTION OF THE TRIAL COURT IN INSTRUCTING THE JURY TO RETURN A VERDICT IN FAVOR OF THE DEFENDANT AND AGAINST PLAINTIFF WAS UNLAWFUL AND IS CONTRARY TO THE LAW AND EVIDENCE. (Specification of Error No. 2.)

This Specification of Error is merely a restatement and particularization of Specification of Error No. 1 and the arguments made under that specification are incorporated in this specification.

THE DISTRICT COURT ERRED IN ENTERING FINAL JUDGMENT IN FAVOR OF DEFENDANT. (Specification of Error No. 3.)

The error of the District Court in granting the motion for directed verdict was carried over into the final judgment it thereafter entered. If the court erred in granting the motion, its error in entering the judgment is equally obvious and additional arguments are not indicated.

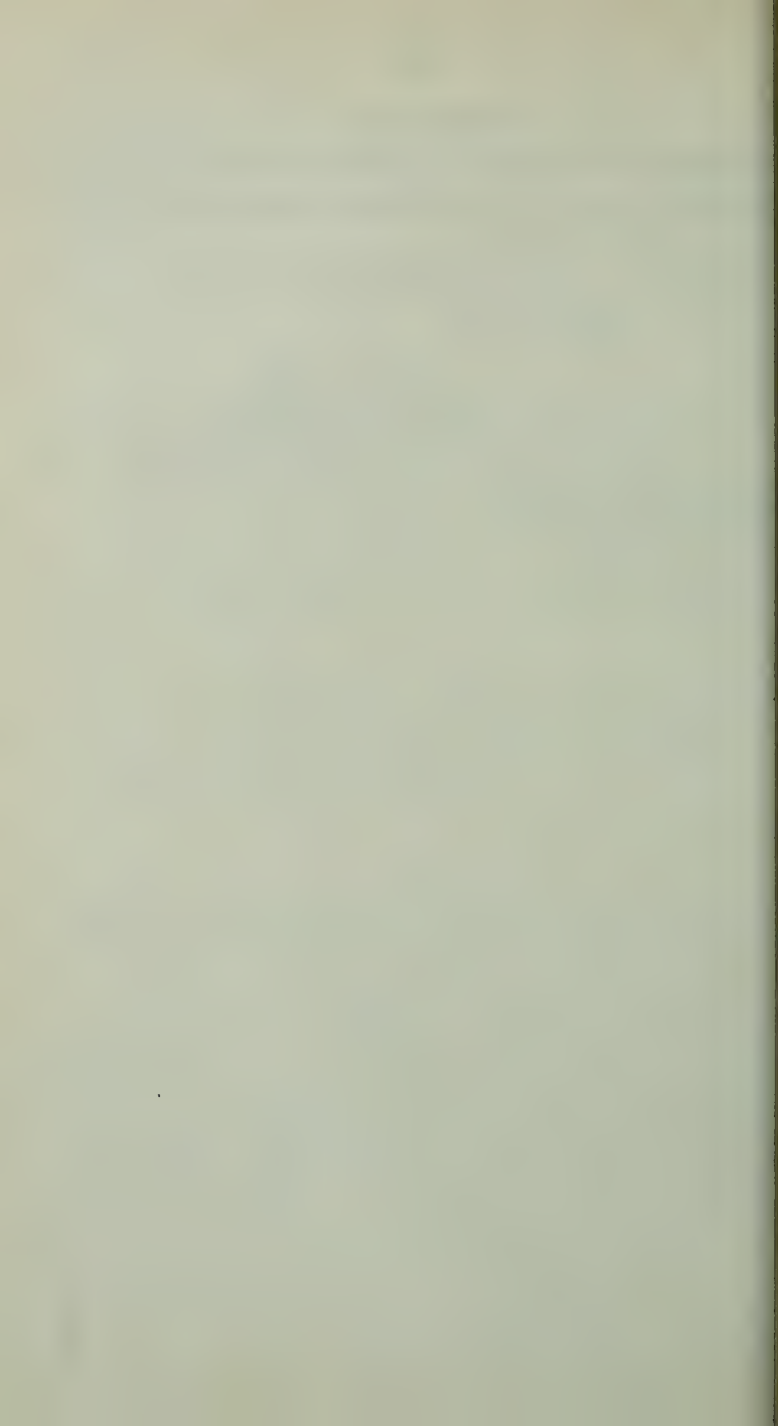
CONCLUSION.

Appellant therefore respectfully submits that the judgment entered on the directed verdict for defendant should be reversed.

Dated, San Francisco, California,
August 9, 1950.

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No. 12,547

IN THE
United States
Court of Appeals

For the Ninth Circuit

ADOLPH J. SCHNEE,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),

Appellee.

Appellee's Answering Brief

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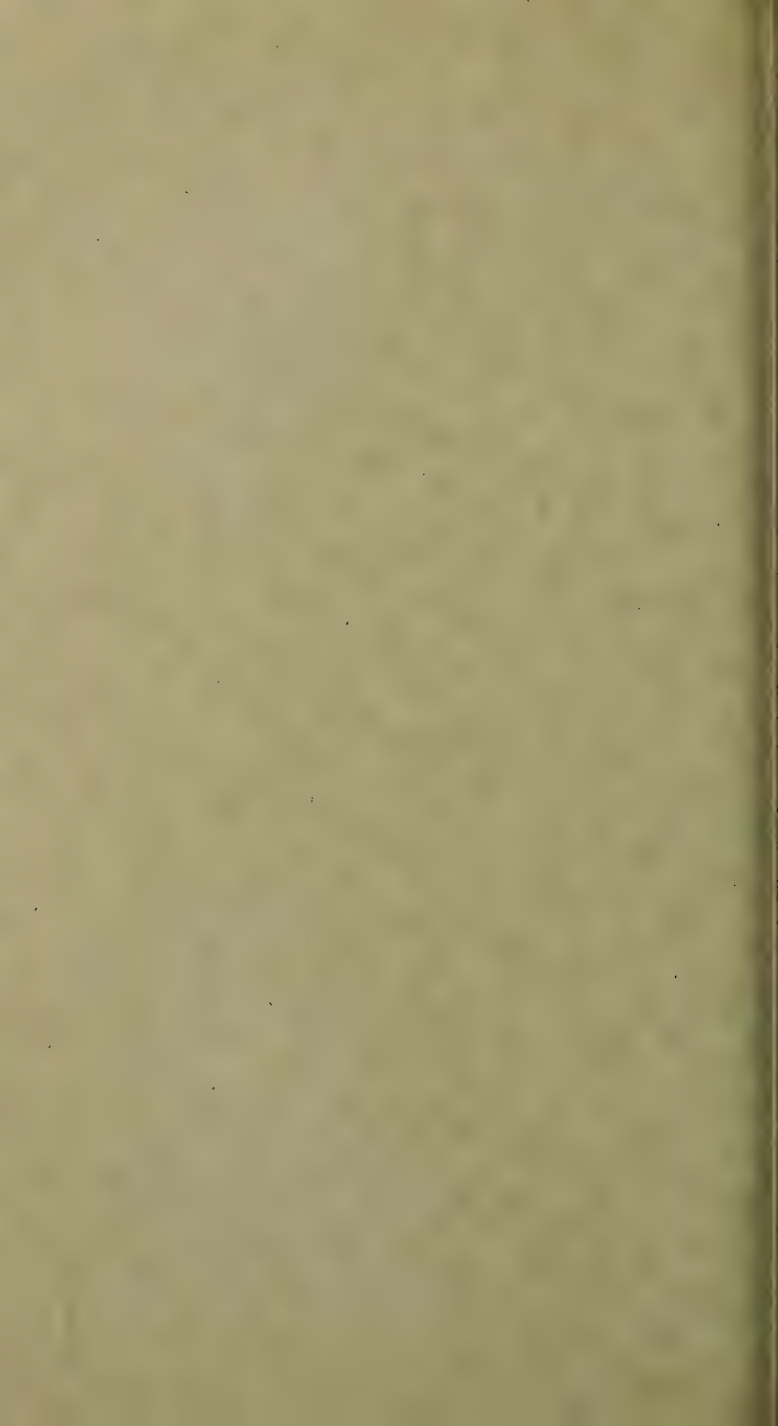
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IN THE
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For the Ninth Circuit

ADOLPH J. SCHNEE,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),

Appellee.

Appellee's Answering Brief

STATEMENT OF THE CASE

Appellant's statement on page 2 through the first paragraph on page 7, Brief for Appellant, outlines accurately the basis of the action below, the applicable statutes and the trial procedure.

The summary of the evidence on pages 8 through 14 of the Brief places emphasis on certain portions of the testimony and omits entirely other portions, apparently on the theory that the court need only be presented with "the evidence and reasonable inference which tend to support" appellant's case.

For example, appellant stresses (Page 13, Brief) the fact that ballast was lower at the scene of the accident than other ballast (citing T. 339-40)—for the purpose of combining this “slanted” version of the evidence with other evidence to raise an inference that surveyors had been at work at the scene of the accident placing surveyors stakes *to level the ballast*. The testimony actually was that at the point where the white pine stake was driven into the side of the railroad tie the ballast had been dented or “crushed down a bit” apparently by the stick when it plunged into the tie. This is vastly different from some widespread “low spot” in the ballast which might need correction by survey parties and section gangs.

Again appellant makes it appear that survey parties festoon the right of way with grade stakes so that the Southern Pacific main transcontinental track resembles a hedgehog bristling with white pine stakes—by use of a question on cross examination answered by a simple “Yes” (T. 171, 192), appellant likewise by distortion of the testimony makes it appear that the defendant’s section foreman was charged with a duty of doing nothing but patrolling the track for surveyor’s stakes and metal brakehangers (T. 169, 172). Actually, the foreman was engaged in track patrol in which, among other things, he was to keep the track clear of *obstacles*.

Appellant wholly omits reference to the clear and illustrative photographs of the scene of the accident and of the motor car, which speak more eloquently of actual conditions and what happened, than isolated fragments of “slanted” statement.

Appellant also wholly omits the compelling statements made by plaintiff himself when the accident was fresh in

his mind, (Exhibits F, G and H), and ignores the plaintiff's blanket repudiation at the trial of all three statements, taken at different times by different people, although admittedly over plaintiff's signature (T. 397), a fact plaintiff could not well deny in view of a comparison of signatures (T. 404).

The following statement of the evidence gives a more accurate picture of the evidence.

The plaintiff had been busy, starting at eight o'clock in the morning of August 29, 1946, about his duties as a signalman for the Southern Pacific Railroad on the main trans-continental Southern Pacific railroad track adjacent to Willcox, Arizona (T. 52, 55). After his lunch at 1:00 o'clock in the afternoon the plaintiff took his motor car, placed it on the main line tracks and proceeded east at about seventeen miles per hour to a signal apparatus about two and one-half miles east of Willcox, Arizona (T. 57-9). He examined the signal apparatus and, finding that he needed materials to complete his work (T. 60-63), he thereupon returned to Willcox at the same speed, over the same route, obtained the materials (T. 64-66), and, on his way back, at a point approximately two miles east of Willcox, his motor car gave a vaulting movement (T. 70-71), veering north off the rails onto the ties, until it finally left the track entirely, throwing the plaintiff onto the track and injuring him (T. 85-6, 96, 116, 328-9).

The motor car furnished to the plaintiff and kept by him at Willcox was in very good condition (T. 130) and had been used by plaintiff and his predecessor for several thousand miles (T. 139, 224), being a standard railroad motor car of the type used by signalman generally (T. 53-4 and Photographs D 1-4).

In the morning of the accident, the roadmaster and the assistant division engineer had made a routine inspection trip from Bowie to Willcox and Cochise, covering the place of the accident-to-be, looking at the track and the roadway for the purpose of finding obstructions or defects or conditions in the track which might need attention, but found none at this place (T. 186-189, 191-2, 323). The plaintiff himself as he went over the track was under a duty, in accordance with the rules, to watch the track (T. 228-9), and he *did* watch to make sure "that the track was clear" (T. 69). The signal maintainer and engineer, in their inspection, did not see any survey parties on or near the track (T. 196, 343), although they did see one or two work parties somewhere between Bowie and Willcox (T. 196-7) (twenty-four miles by the map).

The roadmaster and engineer went over the particular place where the accident was to occur, westbound, between ten and eleven A. M. of the morning of the accident (T. 186, 189, 191, 323) and again eastbound between twelve-thirty and one P. M. (T. 191). They were driving their motor car at a speed of between six and fifteen miles an hour (T. 337), making a thorough inspection as they went (T. 187, 191, 323, 337).

The City Marshall of Willcox, and his friend, a mining man, who first went to the scene of the accident, described the marks made by the motor car on the ties as it went along derailed for a considerable distance (T. 86, 115-6), and found near the place where the marks started, a wooden stick, approximately eighteen inches long, an inch and a quarter square (T. 90, 108), which had one end broken off and splintered and the other end burred as if hit by some

heavy object (T. 90, 117). There was oil or grease on this stake (T. 91), but the stick was unpainted (T. 91) and made of white pine (T. 108). They found splinters for four ties from the place where the motor car left the rails (T. 90). They also looked under the motor car, which was then alongside the track, and saw marks and splinters under the car on the underside of the car flooring (T. 103, 113, 115-6) "where something had struck it apparently and had lifted the car" (T. 116). They also found an abrasion on a cross-tie in the track, just off center of the track, at a place three or four ties before the derail marks started (T. 115, 117).

Railroad employees later went to the scene of the accident, found the stick described by the City Marshall (T. 142-3, 356) and found the abrasion on the track (T. 325-7, 351). This abrasion was described as a hole about an inch and a half in diameter (T. 330, Photograph C 4, 5), three or four inches below the top of the tie (T. 329, 351), and going into the tie about half an inch (T. 329) at an angle of approximately forty-five degrees (T. 329, 351). The hole was filled tightly with wood fibers which ran lengthwise into the hole, whereas the crosstie fibers ran diagonally across the grain (T. 352). The wood stick bore markings of some caustic material "all around" for about twelve inches along its length (T. 143, 150, 154, 198, 358).

The duties of the plaintiff as signalman included the building of batteries for signals on the railroad (T. 120, 130, 219, 224). Plaintiff had spent a very busy week rebuilding batteries before the accident (T. 224). This process involved the filling of glass jars, fourteen inches deep, with water and with a unit of metal plates and stirring into the water cubes of caustic soda (T. 149, 220). This operation

was ordinarily performed by stirring the water, when the cubes had been placed in it, with a wooden paddle (T. 149, 221).

A more thorough examination of the motor car after the accident showed a broken wedge of wood similar to that in the white pine stick between the floor of the car and the brake rod, at a point some seven-eighths inch extending up to the floor of the car (T. 355, 357, 363-5, Photographs C 1, C 2). Immediately in front of the brake rod is an angle iron extending down two and one-half inches in front of the brake rod and being three and one-half inches in front of the brake rod (T. 364). There was a clearance between the floor of the car and the top of the rails of between fifteen and sixteen inches (T. 365). The wedge found under the motor car was approximately fourteen to sixteen inches in from the side of the motor car (T. 365), and the hole in the tie was found at a point fourteen to sixteen inches from the north rail (T. 352). The stake showed a grease mark at the end where the fibers were broken off, apparently from grease on the brake rod (T. 357). Many pictures were taken of the place of the accident and of the motor car itself and of the wedging of the wood under the motor car (C 1-2, J, K, L, D 1-4).

The plaintiff admitted that his signature appeared on a signed statement taken after the accident by the railroad investigator (T. 397). This statement was taken in the presence of the supervising registered nurse, with permission of the doctor (T. 282, 306), who testified that plaintiff was competent at the time (T. 294, 297-8, 303) under strenuous cross-examination finally terminated by the Judge after excessive badgering of the witness (T. 134). In this signed

statement plaintiff admitted that he had been using a grade stake two and one-fourth feet long by one and one-fourth inches by one and one-fourth inches to stir battery fluid into batteries, that he had been building batteries the afternoon before or the morning of the accident and had used this grade stake, and that he was carrying the grade stake on his car (T. 412, Exhibit G).

The plaintiff on the stand testified that: "I don't recall using a surveyor's grade stake" (T. 400). The plaintiff also denied remembering making the written statement in which he admitted using and carrying the grade stake, claiming that he was unconscious or mentally incompetent at all times when such statement was taken (T. 241, 400). For good measure, plaintiff also repudiated two other statements (T. 235-41; 243), admittedly signed by him (T. 397), given at other times to other persons, and which were corroborated on the witness stand under oath by such persons (T. 315-18; T. 279-282, 288).

ARGUMENT OF THE CASE**I.****In F.E.L.A. Cases There Still Must Be More Than a Scintilla of Evidence of Defendant's Negligence Before the Case May Be Properly Left to the Discretion of the Jury.**

The United States Supreme Court has reaffirmed the proposition that under F.E.L.A. the employer is not the insurer of his employees, that the basis of liability has not been shifted from negligence to absolute liability and that the weight of the evidence under the Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact.

We have arrived at this conclusion from the language contained in *Wilkerson v. McCarthy*, 336 U.S. 53, 93 Law Ed. 497. Mr. Justice Black in this case states:

“* * * The Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct since the Act imposes liability only for negligent injuries.” (From page 61 U.S., 504 Law Ed.)

The same Justice Black in the earlier case of *Galloway v. U. S.*, 319 U.S. 372, 87 Law Ed. 1458, seemed to indicate that a directed verdict was a relatively modern invention and that any common law case in which a jury may be demanded should never be taken from the jury since the jury must be deemed as capable of finding a correct answer as the court. (See Judge Minton's decision on *Trust Company v. Erie R. Co.*, 165 Fed. 2nd, 806, at 810.) Subsequent to the *Galloway* decision, however, the United States Supreme Court conclusively demonstrated that on this point

Mr. Justice Black represented only a minority of three judges, Black, Douglas and Murphy, in this opinion, if in fact this was their opinion, and that in F.E.L.A. cases the plaintiff must still bear the burden of proof or suffer a directed verdict. In *Brady v. Railway*, 320 U.S. 476, 88 Law Ed. 239, the majority of the court, Black, Douglas, Murphy and Rutledge dissenting, specifically held that:

"The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

This stand of the majority was further strengthened by the language of Mr. Justice Frankfurter concurring in the *Wilkerson Case, supra*:

"The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge." (See page 65 U.S.; page 506 Law Ed.)

Judge Claude McCulloch, who tried this case below, is a fully experienced trial judge and would never come under

the classification of a "timid judge" referred to above. Judge McColloch in this case assessed the plaintiff's evidence fully and accurately and found it wanting. The majority of the United States Supreme Court has indicated that his action in so doing, was legally proper.

In the *Wilkerson Case*, *supra*; Mr. Justice Douglas appends a list of cases showing that the United States Supreme Court in the past decade has in thirteen cases sustained the action of trial courts in taking plaintiff's case from the jury. The *Brady*, *Hunter* and *Eckenrode* cases listed were decided by a majority of the court in written opinions, (Black, Douglas and Murphy dissenting in each), and the other cases were memorandum opinions in which certiorari was denied.

More so perhaps than in other types of litigation, the law in F.E.L.A. cases arises out of the facts, and each case depends almost wholly on the facts shown therein. An excerpt from the *Brady* case is often quoted:

"An examination of the proven facts to determine whether they are sufficient to permit a verdict by the jury for the decedent's estate based upon reason is of no doctrinal importance. Every case varies." (Page 480 U.S.; page 243 Law Ed.)

Therefore, we proceed with this argument upon the basis that the employer is still not regarded as an insurer of his employees under the Act; that proof of negligence is still necessary to sustain a recovery under the Act; and that in a proper case a trial judge is still under a duty to direct a verdict when the evidence of defendant's negligence amounts to no more than "a scintilla", or where submission would involve "mischance of speculation over legally unfounded claims."

II.

No Inference of Negligence, or "Res Ipsa Loquitur," Arises When:

**(a) The Actual Cause of the Accident Is Conclusively Shown;
or**

**(b) When None of the Instrumentalities Involved in the Accident
Are in Sole Control of Defendant as to Inspection and User.**

(a) The doctrine of "*res ipsa loquitur*" has given rise to reams of judicial opinion and law writers' text. Judge McColloch, in the trial of this case, indicated that he did not favor the use of the term *res ipsa loquitur* since it tended to confuse what otherwise were simple issues. As appears from a summary of the evidence in this case, there can be no reasonable doubt concerning the cause of the accident here. A white pine stick approximately twenty-four inches long and an inch and a quarter square, one end of which was driven by the motor car into a railroad tie at a forty-five degree angle about four inches below the top of the tie, and the other end of which was wedged against the brakerod on the under-side of the motor car, caused the motor car to lift from the rails while it was running and derail,— the lifting action being very much like that seen when a pole vaulter, after a running start, places his vaulting pole at a forty-five degree angle in a trough under the crossbar to be cleared and lifts himself forward and upward off the ground to clear the bar.

The specific cause of the accident having been shown beyond any reasonable doubt, there was no reason for the doctrine of *res ipsa loquitur* to come into play (*Omaha Company v. Railroad*, 120 Fed. 2nd, 594; Cert. Den.; 314 U.S. 645; 86 Law Ed. 517; see annotation in 59 A.L.R. 468 and illustration at page 471). This was the attitude taken by the trial judge in this matter.

(b) If we must consider the doctrine, however, the most recent definition thereof in this court appears in *U. S. v. Johnson*, 181 Fed. 2nd 577, at 582, C.A.9. This court quotes from Mr. Wigmore as follows:

“(1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured. It may be added that the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.” (Wigmore on Evidence, Third Ed., Sec. 2509.)

The motor car used by plaintiff was a standard type motor car (T. 53-4, 139, 156) in very good condition (T. 130) which had been driven thousands of miles by the plaintiff and his predecessor (T. 139), and there is no evidence whatsoever in the case that this motor car was defective in any respect. We say this advisedly in the face of appellant's statement on Page 18 of the Opening Brief claiming in argument, although *not* shown by the facts, that the motor car was unstable and was of improper construction. What “proper construction” might be under the circumstances is nowhere shown, although the inference is that such motor car should be made so heavy (it did weigh 495 lbs.—T. 156) that the signalman using it could not lift it from the tracks,

and should be made so "bullet shaped" or "streamlined" that any object striking it would not find lodgement.

As to the first implied requirement, a motor car must be constructed light enough so as to be readily removable from the rails by the signalman using it so as to give free passage to freight and passenger trains on the tracks. As to the second implied requirement, there is no rule of law which requires the invention of types of equipment which will be impervious to any danger, however remote.

At page 17 of the Opening Brief, appellant, without citation to the Transcript, flatly states that the motor car "was furnished and maintained by defendant and respondent". It is true that the defendant railroad company furnished the signalman with the motor car. The evidence showed that plaintiff had complete control and supervision over the motor car in his use of it in patrolling his section of the transcontinental track (T. 55-8, 225, 292-3). It is, therefore, nowhere shown in the evidence that as to the motor car "both inspection and user" was in control of the defendant company and, in fact, the contrary appears, that both the inspection and control were in the plaintiff signalman.

This leaves the tracks, rails and roadbed as the "apparatus" which must be, as to "inspection and user", in the control of the defendant. First of all, it was not any defect in either the tracks, rails or roadbed which caused the derailment here. It was the white pine (T. 108) two-foot stick (T. 326-331; 356-360; Photographs C-1, C-2, J, K, L, D-1 to 4) which acted as a lever for a fraction of a second, raising the motor car (T. 116) more than the inch and a quarter necessary to free the wheel flanges from the rails (T. 52,

364). When the motor car, after its momentary vaulting, came down again, it came down north of the rails and, after running along the ties for some distance, it left the track (T. 86, 155, 328, 338).

The condition of the tracks, rails and roadbed was as much under the control of the plaintiff as it was of the defendant. The plaintiff in his patrolling of the tracks as signalman was at all times under duty to watch for obstructions in the track or to keep a "clear track" (T. 69, 228). His testimony showed that *twice immediately prior to the accident* he had passed over the place where the accident occurred (T. 59, 64-5). His eyesight was normal, 20-20 (T. 73), and there was nothing to distract his attention (T. 67-9).

It is further common knowledge that the transcontinental main tracks of the railroad are not an exclusive highway for railroad cars and traffic alone. Pedestrians and hoboes use the tracks freely to go across country, and train passengers and casual passengers on freight cars throw objects on tracks and road beds without second thought. The only duty which the defendant bears to its tracks, rails and roadbed is the duty of reasonable inspection and maintenance, which will be covered in the subdivision following.

The appellant cites *Jesionowski v. Railroad*, 329 U.S. 452, 91 Law Ed. 416, as authority for his position that the derailment of the motor car *of itself* was sufficient in this case to raise some inference of negligence on the part of defendant. It would appear, in fact, that plaintiff's whole case was prepared and tried with the Jesionowski case in mind. A reading of that case, however, shows that there was involved in the accident a "frog" operated by a spring

mechanism, and that if the spring failed to work when the car wheels passed over it, the cars might be derailed. Some other evidence tended to show that at the time the derailment occurred splinters and planks were thrown into the air near the "frog". (See page 455 U.S.; page 420 Law Ed.) The injured employee had no control whatsoever over this "frog", and the defendant railroad *did have exclusive control over the "frog"* as well as over the operation of the train involved in the accident:

"* * * to infer that either the negligent operation of the train or the negligent maintenance of the instrumentalities other than the switch was the cause of the derailment. It was uncontroverted that the railroad had exclusive control of both." (See page 458 U.S., page 421 Law Ed.)

In that case, it once having been established by the jury that the railroad employee was free from negligence in handling the only instrumentality over which he had some control—the switch—then the court properly held that, there being some evidence that other factors *in the exclusive control of the defendant* had something to do with the accident, the jury could infer negligence on the part of the defendant.

That the *Jesionowski* case did not overturn the long established test announced by Judge Pope of this court in the *Johnson* case above, is made clear in *Johnson v. U. S.*, 333 U.S. 46, 92 Law Ed. 468. That appeal arose out of a decision under the Jones Act, which makes applicable to such suits the standard of liability of F.E.L.A. The testimony of the plaintiff there, if it were accepted as true, showed that *he had no control* over the apparatus which caused his injury. When he was hit by a block dropped from

the deck above him, he was bending over coiling a line. The court said:

"We need not determine what the result would be *if it were shown that petitioner was pulling on the rope when the accident happened*. For the uncontradicted evidence is that he was not pulling on the rope, but was bending over coiling it on the deck. But where, as here, *the injured man is not implicated*, the falling of the block is alone sufficient basis for an inference that the man who held the block was negligent. In short, Dudder (defendant's other employee) *alone remains implicated*, since on the record either he or petitioner was the cause of the accident and it appears that petitioner was not responsible." (Page 48 U.S., page 472 Law Ed.)

In the present case, the plaintiff had control and inspection of the motor car; he had control and inspection of the tools and apparatus which he kept on the motor car and had full control and operation of the motor car. Plaintiff, under the requirement of his duties, was responsible for inspection of the tracks over which he rode. There was nothing concerned in the accident over which the defendant itself, through its other employees, had *sole* "inspection and user".

This court has had occasion to consider both of the above cases in its recent decision of *The Rocona v. Company*, 173 Fed. 2nd 661. This court said in the Rocona decision what we have said above:

"(In the Jesionowski case) it was proper to apply the rule of *res ipsa loquitur* on the assumption that the railroad had *exclusive* control of the remaining probable causative instrumentalities."

In the *Rocona* case, the defendant had exclusive control of the tugboat which was apparently the only other instrumentality which could have caused the accident. This court properly held that, despite the testimony of the tugboat operators, the evidence was sufficient to support a reasonable inference of negligence on the part of the tugboat operators.

In the present case, the main line transcontinental track upon which the accident happened had been thoroughly inspected not only by the plaintiff himself but also by other employees of the railroad on the morning of the accident (T. 162-3, 169, 170, 174, 186-189, 191-2, 323, 337). The plaintiff in his motor car had passed over the place of the accident *twice within the hour* before the accident (T. 59, 64-5), and an inspection car on which the assistant division engineer and the signal supervisor were riding and making their regular track inspection also had passed over the same spot once in the morning and again within the hour before the accident (T. 191). There was no evidence whatsoever that the white pine stick which caused the accident had remained upon the track for any length of time so that the railroad might in the exercise of due care have discovered it, or that the stick was in a position to cause the derailment for any length of time before the accident happened. Appellant refers to some testimony that the stick was weathered and had oil on it (page 19, Opening Brief), but the reference at the pages of the transcript indicated show that the stick had only oil on it (T. 91). This was later explained by the testimony that the stick had come into contact with the under side of the motor car where there was oil and grease (T. 357). There is no evidence that the

stick was "weathered", the reference by appellant to page 151 of the transcript being wholly unproductive of any evidence on the point. If the stick was "weathered", there is no evidence or reasonable inference therefrom that it became "weathered" by remaining at the place of the accident—it might have been "weathered" in Oregon after it was cut from its white pine tree,—or at some later storage yard.

In making legal research to discover appellate decisions which might involve facts similar to those here, no federal case was found, but a decision in the Supreme Court of Massachusetts, *Lynch v. Railroad*, 200 N.E. 877, involves facts very similar to those found here. In that appeal, a judgment for the defendant, notwithstanding the verdict, was sustained. The employee was killed when a motor car was derailed and, assuming that the testimony of his co-employees who were on the motor car with him was true, no cause for the accident appeared since these employees denied that anything had fallen off the motor car which might cause the derailment. The plaintiff depended upon the doctrine of "res ipsa loquitur", but the Supreme Court held specifically that the doctrine did not apply. There was evidence of: (1) bent bar found at the scene of the accident; (2) of a small gouge in the top and side of a tie at the place of derailment; and (3) marks on the ties. The bent bar was similar to one carried by the decedent in the motor car. There was no evidence of any previous trouble with the motor car, no evidence of any defects in it and no evidence of improper inspection. The Massachusetts Supreme Court held that there was no case for jury decision.

Another state court case from New Hampshire, *Dade v. Boston Railroad*, 30 Atl. 2nd, 485, involved the death of an

employee in the derailment of a motor car. There was some evidence that stones had dropped from trucks loaded with gravel crossing the tracks. There was further evidence that an employee of the company was seen picking small stones off the track. The court, however, held that the most the evidence showed was a *possibility* that the accident may have been due to such a cause and that such possibility depended wholly upon conjecture and could not be submitted to a jury.

A third state court case somewhat similar is *Wallar v. Terminal Company*, 166 Pac. 2nd 488 (Oregon), Cert. Den., 329 U.S. 742, 91 Law. Ed. 640. This was one of the cases cited by Justice Douglas in his appendix to the Wilkerson case above. The plaintiff testified that he lost his footing while trying to step on a boxcar in the railroad yards. He charged the railroad with negligence in: 1) permitting the footpath which he used to become muddy and sleek, and 2) permitting debris and wooden sticks to remain along the ground. Plaintiff's testimony was that he stepped on a stick and that it rolled with him. He further said that he had seen sticks down in yards the day before and had seen some that night. There was testimony that defendant had crews picking up debris in the yards and that it was the duty of these crews to keep the yard clean. The court held that there was not a scintilla of evidence how long the stick, if there was one, had been there (Page 497). The court further held that the fact that an accident occurred constituted no evidence of negligence on the part of defendant in view of the use of the yard by others for whom the defendant was not responsible. (Page 498) The court concludes by saying:

"The rule is firmly established that where plaintiff slips upon an object on the premises of defendant the plaintiff must, in order to show liability, show that the defendant or his agent put the dangerous object there or that they knew, or by the exercise of reasonable diligence could have known, that it was there and failed to exercise diligence to remove it." (Page 498)

Appellee submits on this phase of the case that the doctrine of *res ipsa loquitur* has no application to the facts developed in the evidence.

III.

When a Derailment Is Caused by a "Foreign Object" on the Tracks, Defendant's Negligence Must Consist Either:

- (a) Of Leaving the Object in a Dangerous Position on the Tracks; or**
- (b) In Knowing, or by Exercise of Reasonable Diligence Being Able to Know, of the Dangerous Condition, and Failing to Exercise Diligence to Remove It.**

The test applied by Judge McColloch, when ruling on the motion for directed verdict, appeared to be that set forth in the *Wallar* case above. *Accord: Matthews v. So. Pacific Co.*, 15 Cal. App. 2d 36, 59 Pac. 2d 220; *Spencer v. A. T. & S. F. Ry. Co.*, 92 Cal. App. 2d 490, 207 Pac. 2d 126.

The Safety Appliance phase of the case (under which liability for "safe equipment" under certain stated circumstances is absolute) having been dismissed with consent of plaintiff (T. 408), the only issue concerning the furnishing of a "safe place" for plaintiff to work was one of simple negligence. As to furnishing such a "safe place", the defendant was not an insurer but only "liable for injuries attributable to conditions under its control when they are

not such as a reasonable man ought to maintain in the circumstances', bearing in mind that 'the standard of care must be commensurate to the dangers of the business'". (Mr. Justice Black at page 61, U.S.; page 504 Law Ed. in the Wilkerson case, *supra*.) Defendant's obligation was not such as to impose liability regardless of due care and regardless of whether the injury was one reasonably to be anticipated or foreseen as a natural consequence of defendant's act. (*Wolfe v. Henwood*, 162 Fed. 2nd 998, (CCA 8), Cert. Den.; 332 U.S. 773, 92 Law Ed. 357; *Lasanga v. McCarthy*, 177 Pac. 2nd 734 (Utah), Cert. Den.; 332 U.S. 829, 92 Law. Ed. 403; *Beamer v. R. R.*, 26 S.E. 2nd 43 (Va.), Cert. Den.; 321 U.S. 763, 88 Law Ed. 1060.

It was conclusively established by the evidence that the accident had been caused by the white pine wooden stick wedging itself between the under side of the motor car and the side of the railroad tie in such a way as by leverage, in the fraction of second before it broke, to raise the car a distance sufficient to free the car wheel flanges from the rails and cause the car to plunge forward off the rails onto the track. This being shown, it then became necessary for the plaintiff to show either: (A) That the defendant railroad or its agents had placed this stake on the tracks in such manner that it was dangerous to passing motor cars; or (B) That the defendant or its agents knew, or by the exercise of reasonable diligence could have known, that the stake was there in a dangerous position—and failed to exercise diligence to remove it. (See also *Matthews v. So. Pac.*, 15 Cal. App. 2d 36, 59 Pac. 2nd 220; *Spencer v. A. T. & S. F. Ry. Co.*, 92 Cal. App. 2d 490, 207 Pac. 2d 126). These two theories will be discussed separately.

(A) DID THE DEFENDANT COMPANY, THROUGH ITS AGENTS, LEAVE THE PINE STICK IN A POSITION ON ITS MAIN TRACK DANGEROUS TO PASSING MOTOR CARS?

The only evidence connecting the "white pine" stick (T. 108, 356, Photo C-2) with the defendant railroad was testimony that the stick resembled a "grade stake" (T. 89, 110) or a "surveyor's stake" (T. 142) similar to those used by railroad survey crews (T. 171, 175, 192). The stake had no survey marks on it (T. 91). There was evidence that no railroad survey crews were in the vicinity of the accident (T. 343, 196). Section crews had been seen somewhere between Bowie and Willcox (T. 196-7), a distance of twenty-four miles on the map, but no surveyors (T. 343). The plaintiff had operated his motor car over the place of the accident *twice* that day, before the accident occurred, and had seen no survey parties. The assistant division engineer and signal supervisor had also operated their motor car over the place of the accident, once in the morning and again shortly before the accident, proceeding for many miles in both directions, and they too had seen no survey parties (T. 196, 343). Yet if the stake had been left by a survey party in the position in which plaintiff urges it must have been at the time the accident occurred—that is, firmly imbedded about four inches below the top of the railroad tie in the side of the tie (T. 115, 325, 327, 329-331, 340, 369, Photo C 4-5), protruding upwards at an angle of forty-five degrees for fifteen to sixteen inches above the rails (T. 365) in a westerly direction (T. 350-2), the direction from which the plaintiff was to come in his motor car—then it follows the stake must have been driven by surveyors into the side of the tie within the short interval from the time the plaintiff left the signal, returned to Willcox—over the

place of the later accident—to get the missing parts, and the happening of the accident on his return from Willcox (T. 64-5, 68), otherwise plaintiff would have seen it, or hit it in one or the other of his two trips over the same spot. Using the overall mileage given as being about four miles (T. 59, 163, 403) and the speed at which plaintiff traveled as being about seventeen miles per hour (T. 68), and allowing ample time for the plaintiff to get his equipment in Willcox, there could only have been at most a half hour between the time the plaintiff passed over the accident scene, westbound, and the time of the accident itself. In that interval the jury, without any factual basis, would have to find that an up-to-that-point unseen surveyor hammered the white pine stick into the side of a treated railroad tie (T. 340-1) at a forty-five degree angle, thrusting more than fifteen inches into the air above the rails (T. 365), for purposes which no one could conceive, and that the phantom then left, surreptitiously and secretly, never to be seen again.

The above is, of course, wholly conjecture and speculation. It is wholly speculative in the first place to conjecture that the wooden stick had been used at any time by the defendant's surveyors, or, if it had been so used, that it came to the scene of the accident through any act on the part of defendant's surveyors or defendant's employees. It is entirely possible that the stake had been part of a bundle of sticks gathered by some wandering tramp or hobo to make himself an evening fire, and that he had dropped the stick in his weary walk into Willcox. It is equally possible that a passerby might have thrown the stick onto the railroad track or that it had been dropped there by some passenger on a train or on a freight.

Then it is wholly conjecture and speculation that the stick was left by defendant's hypothetical surveyor or other employee in any position in which it could cause the accident which occurred. The testimony is that surveyors stakes had been seen lying on the roadbed adjacent to the track (T. 172, 192, 344) and that occasionally surveyors stakes were seen driven into the ballast between the rails (T. 175) protruding not more than a few inches above the ballast and *below* the rails (T. 175). If the stake was lying between the rails, what force was it which made it suddenly stand up at a forty-five degree angle in such manner as to plunge one of its ends into the railroad tie and the other into the under side of the motor car? Did this stake, like the rope in the fabulous Indian rope trick, have the power of levitation? The hole driven by the stake into the tie was fully fifteen inches from the nearest rail (T. 352, 327, 115). By what mental processes could the reasonable jurymen arrive at the conclusion that the stake was actually or potentially a dangerous instrumentality, known to be such by the railroad's employees, or placed in such position on the track by the railroad's employees, so that it became a dangerous instrumentality? As said in the *Dade* case above, this conclusion would have to depend "wholly on conjecture". Under these circumstances, the trial judge properly withdrew the case from jury consideration. (*Eckenrode v. R. R.*, 164 Fed. 2nd 996, affirmed in 335 U.S. 329, 93 Law Ed. 41; *Trust Co. v. R. R.*, 165 Fed. 2nd 806 (C.C.A. 7), Cert. Den., 334 U.S. 845, 92 Law Ed. 1769; *Cowdrick v. R. R.*, 39 Atl. 2nd 98 (New Jersey), Cert. Den., 323 U.S. 799, 89 Law Ed. 637.

B) DID THE DEFENDANT, THROUGH ITS EMPLOYEES, KNOW OR BY THE EXERCISE OF REASONABLE DILIGENCE COULD IT HAVE KNOWN THAT A DANGEROUS CONDITION EXISTED, AND THEN DID IT FAIL TO EXERCISE DILIGENCE TO REMOVE IT?

What can be said on this point is largely a repetition of what has been said before. If plaintiff's theory is to be followed, it must be assumed that a two-foot stick, one and one-half inches square, lying inert between the railroad tracks, or pounded into the ballast so as to protude not more than a few inches above the ballast and *below* the railroad rails (T. 175) creates a dangerous condition which was known, or should have been known, to the defendant railroad. Again we repeat that the plaintiff himself drove his motor car over the place of the accident *twice within the hour before the accident*; that his vision was 20-20, which is excellent (T. 73); that his duties required him to look for objects on the track, and that he did not see any. If the stick had been in a "dangerous" position on either of those occasions, the accident would have happened *then* and not the third time the motor car passed over the same spot.

The testimony further shows that the regular inspection made by the assistant division engineer and the signal supervisor in the morning of the accident and again shortly before the accident did not reveal any dangerous condition or any object on the track. (T. 170, 186, 189, 191, 323) And this despite the fact that the appellant lays some stress on the fact that these employees failed to discover a brakehanger which was on the road bed some one hundred feet distant from the scene of the accident (T. 114, 155-5). The photographs clearly show that the brakehanger was by no stretch of the imagination a "dangerous" obstacle or a

potential danger of any sort to passing traffic, and that therefore the plaintiff himself and the other railroad employees were under no duty to take any action regarding such hanger (which of course had nothing to do with the accident itself, being more than seventy ties from the place of derailment) (T. 114, 142).

The evidence, therefore, wholly failed to show expressly, or *by any reasonable inference*, that defendant had been negligent under either test set forth above.

IV.

Plaintiff's Testimony Is Not Sufficient to Carry Issue of Railroad's Negligence to the Jury When It Is so Opposed to Known Facts and Reasonable Inferences Therefrom That Jury Could Not Fairly Reconcile It with Such Established Facts.

The foregoing argument must leave a question in the court's mind, as it did in the trial court's mind, that since the accident *did* happen, and since the white pine stick undoubtedly caused the accident, where did the stick come from?

The railroad's hypothesis or reconstruction of the facts showed that the plaintiff signalman in the course of his duties was engaged in the rebuilding of storage batteries used to maintain signals along the main line of the railroad (T. 120, 130, 219-223, 228). Plaintiff was extremely busy for the week before the accident rebuilding storage batteries at points along the main track (T. 224). The batteries were glass jars, 14 inches deep by 4 x 5½ inches wide, which were filled with water (T. 149, 198) to a certain level (T. 149). Cubes of caustic soda were placed in the water and dissolved *by stirring* (T. 149, 220-1). In stirring the caustic soda into the water, it was obvious that metal could not be

used, and therefore signalmen used *wooden sticks*, usually thin pieces of wood whittled out of orange crate slats (T. 149-50, 221). The wooden stick which caused the accident was a proper length (T. 198, 90, 143) to be used in stirring a battery solution and was stained for twelve inches "all around" (T. 198), showing it had been used in stirring caustic soda to a depth of twelve inches (T. 143, 149-151, 154).

The statement given by the plaintiff shortly after the accident (Exhibit G, T. 408-413), taken by the company investigator (T. 245-253) with the permission of plaintiff's doctor (T. 260, 306) and in the presence of the registered nurse who testified that the plaintiff was mentally competent to make the statement (T. 297, 303-5), admitted that the plaintiff had used a grade or surveyor's stake, one and one-fourth inches square and two and one-fourth feet long (T. 412), in building batteries during the very busy week preceding the accident, and that he had carried this stake on his motor car (T. 412). It therefore seemed very clear to the engineers reconstructing the accident that the stick which caused the accident was the stake used by the plaintiff in building batteries and carried by the plaintiff on his motor car (T. 351, 355-359, Photographs C-1, C-2, D-1-4).

As shown by the photographs and by the plaintiff's testimony, the plaintiff had a safe place on his motor car to carry tools and equipment in the form of a trough, with a partition some nine inches high at the front end thereof (Photos D 1-4, T. 412). Plaintiff testified that he was driving his motor car in a forward direction (T. 59). Therefore, there seem to be only two possible conclusions to be drawn from the evidence.

One conclusion is that the plaintiff had balanced the stake somewhere on his motor car in such position that it worked forward and fell from the front end of the motor car, flipping over and over to bury its sharp point in the side of the tie and to come up under the car with the other end *between* the angle iron and the brake rod. (The angle iron is in front of the brake rod and hangs down *an inch and a quarter lower* than the rod (T. 363-4, Photo D-4). The forward drive of the motor car forced the point into the tie and wedged the blunt end into the undercarriage at a forty-five degree angle so as to cause the vaulting movement and "sudden jolt from the bottom" noted by the plaintiff in his testimony (T. 69-70).

The only other conclusion which seems reasonably possible is that the plaintiff used the stake in such manner that it became somehow wedged in the undercarriage of the motor car and that the pointed end kept dropping lower and lower as the car went over the rails until it finally buried its point into the side of the railroad tie at the forty-five degree angle shown.

The ingenuity of the human mind might discover other possible ways in which this grade stake took the position of a pole-vaulter's pole and, in the fraction of a second before it broke, lifted the motor car the few short inches necessary to untrack the car.

If, as the plaintiff testified at the trial, he did not "recall using a surveyor's grade stake" (T. 400) to build batteries (Plaintiff was so evasive on some points in his testimony (T. 222) that Judge McColloch had to advise him: "Will you answer the gentleman?" (T. 233).) and did not carry a grade stake on his motor car at any time nor any

piece of wood on his car that day or probably for days before (T. 401-2), then there *just is no reasonable explanation* of how the accident happened. The appellant may urge the doctrine of *res ipsa loquitur* as strenuously as he cares, and may contrive speculative inferences connecting "surveyors' stakes" and "railroad surveyors", and urge "failure to inspect" and all the other arguments that a stimulated ingenuity can devise, but the physical facts do not lead to any reasonable conclusion other than the inescapable conclusion that the stick which caused the accident was a stick which the plaintiff had been using to stir caustic soda into the batteries which he had been building; that this stick alone caused the accident, and that no negligence whatsoever on the part of the defendant in this connection was shown.

On this point, we refer the court to the rule that if the plaintiff's evidence is contradictory to the known facts and all reasonable inferences arising therefrom, then there is no case for a jury. (*Redman v. R. R.*, 70 Fed. 2nd 635, 637, modified on other grounds; 295 U.S. 654, 79 Law Ed. 1636; *Pa. Ry. v. Chamberlain*, 288 U.S. 333, 77 Law Ed. 819; *Scocozza v. R. R.*, 171 Fed. 2nd 745; Cert. Den. 337 U. S. 907, 93 Law Ed. 1719.)

CONCLUSION

Appellee respectfully submits that Judge McCulloch's decision directing a verdict on behalf of defendant at the close of all the evidence on the issue of liability should be sustained.

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No. 12,547

IN THE

United States Court of Appeals
For the Ninth Circuit

ADOLPH J. SCHNEE,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

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PAUL P. O'BRIEN,

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No. 12,547

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APPELLANT'S REPLY BRIEF.

FOREWORD.

For convenience, the headings of Specification of Error No. 1 in the opening brief (AOB 14-17) are adopted in replying to the arguments of appellee.

THE DISTRICT COURT ERRED IN DIRECTING A VERDICT FOR DEFENDANT UPON MOTION OF THE DEFENDANT. (AOB 14-20.)

Under the law, it was the duty of the trial judge in passing upon the motion for directed verdict to "look only to the evidence and reasonable inferences"

which tended to support the case of plaintiff. (*Wilkerson v. McCarthy*, 336 U.S. 53, 57, 69 S.Ct. 414, 415, 93 L.Ed. 497.) And under the law, it was for the jury and not the trial judge to resolve conflicts of evidence and to pass upon the credibility of witnesses and the weight to be given their testimony. (*Wilkerson v. McCarthy*, 336 U.S. 53, 57-60, 69 S.Ct. 413, 415-417, 93 L.Ed. 497.)

On this appeal, therefore, the appellant was entitled to rely and did rely solely upon the evidence and reasonable inferences which tended to support his case when viewed in the light most favorable to him. Obviously, the nature of the appeal did not and does not require appellant to discuss, nor does it require this court to consider, conflicts of evidence, weight of conflicting evidence, or credibility of witnesses.

It is quite apparent from its brief, however, that appellee has either misconceived the scope of review on an appeal of this nature or is unwilling to abide by the settled rules governing such review. Appellee fashions a statement of facts (AAB 3-7) and a theory of accident (AAB 26-29) by selecting from the record evidence most favorable to *appellee* and attempting, throughout its brief, to dictate the credibility and weight to be given evidence and the inferences to be drawn therefrom. Those, of course, were functions to be performed by the jury in the trial court: they are not functions which an appellee may usurp and dictate to an appellate court.

(a) **Res ipsa loquitur.**

On the rule that a broad application is to be given the doctrine of *res ipsa loquitur* in Federal Employers' Liability Act cases, it is enough to again refer to *Jesionowski v. Boston & M. R. R. Co.*, 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 355. (AOB 15.)

Appellee contends, however, that the doctrine was here inapplicable for one or the other of two reasons: (a) "The actual cause of the accident is conclusively shown"; (b) "When none of the instrumentalities involved in the accident are in sole control of defendant as to inspection and user" (AAB 11). Neither contention is sound.

Plaintiff testified at the trial that as he was operating defendant's motor car along defendant's tracks and over defendant's roadbed, the motor car left the track and was derailed through no fault of his. (AOB 10.) Under the principles of law announced and applied in the *Jesionowski* case plaintiff was therefore entitled to the benefit of the *res ipsa loquitur* doctrine. It is true that plaintiff also introduced some circumstantial evidence suggesting the grade stake as the definite cause for the accident. Circumstantial evidence of such character is never adequate to defeat the application of the *res ipsa loquitur* doctrine. (*Leet v. Union Pacific R. Co.*, 25 Cal. 2d 605, 155 P. 2d 42.)

Plaintiff told enough at the trial of what he did and how the accident happened to permit the conclusion that the fault was not his. Under the principles of law announced and applied in the *Jesionowski* case

plaintiff was therefore entitled to the benefit of the *res ipsa loquitur* doctrine. The rule is not a new one. (*Metz v. Southern Pac. Co.*, 51 Cal. App. 2d 260, 124 P. 2d 670; *Ronconi v. Northwestern Pac. R. Co.*, 35 Cal. App. 560, 170 P. 635.) The evidence before the court is undisputed that the defendant owned the motor car, the tracks, and the roadbed, and that plaintiff was its employee and acting as such at the time of the accident. If, as the appellee suggests, appellant was charged with some duty or duties respecting maintenance and inspection of the motor car, the tracks, or the roadbed, the question thereby presented was one of fact for the jury and not one of law for the trial court.

(b) Apart from *res ipsa loquitur*.

In contending that the evidence was insufficient to take the case to the jury, appellee challenges certain statements of fact appearing in appellant's opening brief. For the most part these have reference to the grade stake. It is said, for example, that appellant was in error in stating that the stake was "weathered". (AAB 17-18.) The record supports the statement of appellant that the stake was "weathered". Defendant's witness Ward testified as follows (T 150):

"The Court. Had this stake been painted?

A. Not that I would say, no, sir. *It had been weathered* I believe." (Emphasis added.)

Again, appellee challenges the statement that the "grade stake" was in fact a grade stake or surveyor's

stake. (AAB 22.) A witness familiar with grade stakes testified that it was a grade stake. (T 110.) A witness for defendant testified that "it was an ordinary surveyor's stake". (T 142.) That it was the type of stake commonly used by defendant along its right of way and even inside the roadbed, is reasonably inferable. (AOB 13.)

After the accident the stake involved or found at the accident scene was taken into possession by the defendant and placed under lock and key. (T 144.) Defendant did not produce it at the trial, and was content to say that it could not be found. (T 142-143.) The inferences arising from the nonproduction of the grade stake by defendant and the sufficiency of defendant's explanation as to why the stake was not produced, were clearly jury questions. In answer to appellee's elaborate contention that the grade stake had been used by plaintiff and was on the motor car just before the accident (AAB 26-28), it is enough to say that plaintiff gave positive testimony that no grade stake or other piece of wood was on the motor car at or before the accident. (T 401-402.)

Without prolonging the argument, appellant repeats that rational basis for a plaintiff verdict in this case is unmistakable either under or apart from the doctrine of *res ipsa loquitur*.

CONCLUSION.

Appellant therefore respectfully submits that the judgment entered on the directed verdict for defendant should be reversed.

Dated, San Francisco, California,
September 27, 1950.

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HERBERT CHAMBERLIN,
Of Counsel.

No. 12,547

IN THE

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For the Ninth Circuit

ADOLPH J. SCHNEE,

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vs.

SOUTHERN PACIFIC COMPANY (a corporation),

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Petition for Rehearing

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IN THE
**United States
Court of Appeals**
For the Ninth Circuit

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Appellant,

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Appellee.

Petition for Rehearing

(Comes now the appellee and moves the Court for a rehearing of the above entitled appeal upon the ground that the Court erred in assuming certain facts, for the purposes of its Opinion, which do not appear either in evidence in the case, or by any reasonable inference from such evidence, and further upon the ground that the Court erred in announcing the rule of *res ipsa loquitur* as applied to the facts shown by the evidence in this case; and the Appellee respectfully requests that the issuance of mandate in this matter be withheld as suggested in the Manual of Federal Appellate Procedure by Paul J. O'Brien (Chapter XXVIII, at page 222), to give the appellee an opportunity to prepare proceedings in certiorari in the event such remedy may later be deemed appropriate.

ARGUMENT

In support of the foregoing motion for re-hearing, appellee submits as follows:

A. Failure of Evidence to Support Court's Opinion.

1. While it does appear that this Court agrees with appellee's opening statement that verdicts in F.E.L.A. cases may not be based upon speculation, and that it is still necessary for the plaintiff to produce more than a scintilla of evidence before such cases may be left to the jury, yet the Court has evolved, on pages 3 and 4 of its Opinion, a theory of the accident which overlooks certain facts established by the evidence and assumes certain other facts which did not appear in evidence. Appellee admits, of course, that the ingenuity of the human mind might discover several possible ways in which the accident in this case could have happened, but such possibilities involve the very element of speculation which the appellate court has repeatedly found objectionable in other appeals.

The Court's theory of the accident, outlined on pages 3 and 4 of the Opinion, assumes:

(a) That the photographs, Exhibits C-4 and C-5, portray such depression in the ballast between the two ties, pictured there, as would raise some inference that a railroad surveyor might mark such spot with a survey stake for attention;

(b) That this depression had existed for some appreciable length of time and was not merely the result of the railroad investigators' clearing away the ballast so that a clear photograph might be taken of the side of the tie to show the hole where the stake had been driven;

(c) That the depression was not caused solely and only at the time of the accident by the down thrust of the stake; or

(d) That Exhibits C-4 and C-5 were meant to portray the conditions of the track at the time of the accident, other than the appearance of the hole in the side of the tie.

Regarding assumption (a), there was, of course, no evidence nor any reasonable inference from any of the evidence, that railroad surveyors are under some duty to fill every depression in the railroad ballast. Other photographs of the track show that the ballast at the place of the accident was in good condition and not in any way endangering the safety of passing trains or other vehicles. All of defendant's evidence was available to plaintiff by the ordinary process of deposition and discovery and if plaintiff at any time, other than in his appellate brief, had maintained that the depression shown on Exhibits C-4 and C-5 was such as to make survey and fill work necessary, such theory could easily have been substantiated by actual testimony to that effect. No evidence, nor any reasonable inference therefrom, exists that the "depression" in ballast shown in the photographs was such defect in the ballast as warranted attention by the railroad surveyors.

In connection with assumption (b), it is obvious that the sole purpose for the taking of these photographs was the demonstration of the hole in the side of the tie, and that the photographer did everything necessary to make the area clearly visible on the photograph, it being a reasonable assumption that the photographer or the investigators cleared the ballast so as to give a clear picture of the hole

in the side of the tie. There is not a scintilla of evidence that a "depression" existed at this point at the time of the accident or for any appreciable time before the accident, and the only evidence showed that some ballast had been pressed down or displaced by the impact of the stick itself. It is pure speculation that any low place existed at the point of accident when the accident occurred. It was only for the first time in appellant's brief that such contention was made.

On assumption (c), the positive testimony was that the ballast was "crushed down" by the stake at time of impact.

Finally, on assumption (d), it is submitted that only by pure speculation can it be maintained that the photograph was intended to portray the condition of the ballast at the time the accident occurred. Subsequent to the accident and before the photograph was taken, the City Marshal of Benson and his friend had made an investigation of the place of the accident, and thereafter railroad employees, engineers and photographers had all carried on a thorough investigation to determine how the accident might have happened. All of these proceedings might well have resulted in some depression at the place found by the Court on the photograph.

The conclusion, we urge, is inescapable that the Court, in writing its Opinion, has made assumptions which are not justified by the record in the case. While there was some evidence that the ballast at the place where the surveyor's stake derailed the motor car was crushed down or below the level of other ballast, there was, as we have shown, no evidence that this was such low spot as needed correction by a surveyor and a section gang, there was no evidence that the low spot existed at the time of the acci-

lent and was not the result of the efforts of investigators and others to determine the cause of the accident by examination of the place where the surveyor's stake had entered the side of the tie; there was positive testimony that the ballast was apparently crushed down by the stake at the time of impact, and, finally, there was no evidence that the photographs to which the Court refers were intended to do anything but give a clear picture of the place where the surveyor's stake had entered the side of the railroad tie. The photographs were not in evidence as any proof that a low spot on the ballast existed at the time of the accident as portrayed in the photographs, or that such low spot had existed at any time other than at the time the photographs were taken.

2. Then the Court assumes, on pages 3 and 4 of the Opinion, that a surveyor's stake may have been carelessly placed between the rails so that its end protruded fourteen or sixteen inches, more or less, above the level of the rails, a height to which it must have been extended if it were to come into contact with the undercarriage of the car (T. 365). The following reasons make it seem that such assumption is again pure speculation:

(a) The testimony specifically showed that such stakes were either found lying on the roadbed or alongside of the roadbed, *or were driven into the roadbed so as to extend not more than three inches from the top of the tie and below the top of the rail* (T. 175). No evidence indicated that stakes were ever found in the position suggested by the Court. No engineering reason can be imagined for such stake position. Survey stakes are driven down into the ballast so that the top of the stake indicates the level to which the ballast is

to be filled. Obviously the ballast cannot come higher than the rail, and therefore the top of the survey stake must be lower than the rail. The ballast is filled in to the top of the stake, which is below the top of the rail.

(b) The plaintiff himself negated such position of the stake since he testified that he was performing his duties, and as part of his duties he ascertained that he had a clear track on three trips over the spot (T. 59, 64-5, 69, 73, 228). Certainly a stake protruding fourteen to sixteen inches above the rail, in broad noon, on a straight, level transcontinental railroad track must be visible to anyone who passes over the place twice within an hour and comes to the place a third time within the hour. It seems almost impossible to believe that such stake would be in any position described by the Court and yet wholly invisible to the plaintiff, sitting upon an open motor car, looking ahead, in pursuance of his duties, to see that he had a clear track, the motor car proceeding at the slow speed of seventeen miles per hour on a single track, in open country where there were no crossings or other things to distract plaintiff's attention, the motor car itself being low on the track and the plaintiff in possession of perfect eyesight.

(c) Then a final reason why the stake could not have been in the position supposed by the Court is, as pointed out in appellee's brief, demonstrated by the physical makeup of the motor car itself. Three and one-half inches in front of the brake rod and extending below the brake rod for two and one-half inches was a solid piece of angle iron extending crossways

the full width of the car (T. 364 and photographs), which obviously would act as a fender or bumper, preventing any stake which struck it from thrusting up and over the brake rod immediately behind it, in the manner shown by the photographs and the evidence.

We again respectfully submit that the only way the surveyor's stake could thrust its head between the angle iron and over the brake rod so as to wedge itself firmly at a forty-five degree angle, between the brake rod and the floor of the motor car, was by being in movement up from the track at the instant that the motor car was passing over it. If the stake had been standing at the height assumed by the Court, loosely stuck into the roadbed at a forty-five degree angle so that the force of the motor car drove the stake through the ballast and into the side of the tie, the top of the stake would inevitably first hit the angle iron which protruded below the brake rod and, we again respectfully urge, the top of the stake would never have come into position *between* the angle iron and over the brake rod immediately behind it. The top of the survey stake would have to be low enough to miss the angle iron and then, in the three and one-half inch space between the angle iron and the brake rod, at a time when the motor car was proceeding about seventeen miles per hour, the survey stake would have to jump from the hole in which it was stuck into the ballast, a distance of two and one-half inches and more, to wedge itself firmly between the top of the brake rod and the floor of the car. It does seem to us that this is carrying speculation to its utmost limits.

3. In its Opinion the Court puts some emphasis on the fact that the motor car might have struck the surveyor's stake and loosened the stake during two trips over it prior to the accident. It is earnestly submitted that, considering the length of the stake and the fact, if the Court's assumption is correct, that it must have been loosely driven into the ballast so that the subsequent impact of the motor car on the stake drove it through the ballast and into the side of the tie, any prior striking of the stake could only have resulted in a lowering of the stake below the level of the angle iron on the bottom of the motor car and thus make it impossible for the stake to thrust up and over the brake rod behind the angle iron.

In conclusion to this part of the argument, the appellee submits that the court in its Opinion has made assumptions and inferences from the evidence not justified thereby, and has failed to consider substantial evidence contradicting or explaining the assumptions which the Court has made to support its Opinion.

B. Res Ipsa Loquitur.

It is admitted that the United States Supreme Court has extended this doctrine to its utmost limits, but the United States Supreme Court to date has said only that this rule applies *if ONE of the instrumentalities which might have caused the accident was within the sole and exclusive control of the defendant or its employees.* In the *Jesionowski* case it was the "frog" which was not connected with the switch, which the plaintiff was handling, in any way and which might have caused the accident there. In the *Johnson* case it was the rope sling which was being used by another employee, which had not been touched by the injured em-

employee and which might have caused the accident. And in the *Rocona* case it was the defendant's exclusive control of the tugboat which the Court held might have caused the accident.

In the present case, although plaintiff was represented by able counsel at the trial and by experienced and learned special counsel on appeal, neither by the evidence adduced at the trial nor by any argument made on appeal has it been shown that there was one instrumentality in any way connected with the accident which was within the sole control of the defendant or its employees. The Court has assumed that the plaintiff was in control of the motor car and the equipment thereon, but has further assumed, for the purpose of trial, that no negligence on the part of the plaintiff in the control of the motor car and the instruments thereon contributed in any way to the accident and the injury. We are not concerned here with specific evidence of negligence which, as we have pointed out in the preceding section, cannot be found in the record of the present case. We are here concerned with a permissible inference that since the defendant company had sole control of the condition of the railroad track and all obstructions or dangerous objects thereon, then it may be presumed that the defendant was in some way negligent in the happening of the accident. The basis for this assumption, however, we respectfully submit, does not exist. The defendant company *did not have* sole control and supervision of the track upon which plaintiff was driving his motor car. The specific duties of *the plaintiff* included a watch for objects which might be dangerous upon the right of way, and the plaintiff admitted in evidence that he was en-

gaged in performance of these duties, that is, the ascertaining that there was a clear track ahead (T. 59, 64-5, 69, 73, 228). Therefore, the discovery and elimination or avoidance of objects which were dangerous to persons on a railroad track was as much under the control of the plaintiff employee as it was under the control of any other employee of the defendant company. Not only did the plaintiff employee have control of the motor car and the equipment on it, *but the employee had control and supervision of the track over which he was travelling.*

Under these circumstances, we earnestly submit that the Court was in error when it is in effect advising the trial court that once the plaintiff has absolved himself from negligence in the control of the motor car and objects thereon then the jury may apply the doctrine of *res ipsa loquitur* to the maintenance or omission to maintain the railroad track in a safe condition upon the part of the defendant. The defendant did not have sole control of this railroad operation, and the plaintiff did participate therein at the time of the accident. Such instruction to the jury would therefore be an extension of the doctrine of *res ipsa loquitur* far beyond the present limits set to that doctrine by the Supreme Court in the *Jesionowski* and *Johnson* cases and by this Circuit Court of Appeals in the *Rocona* case. This would permit an inference of negligence to be raised against the defendant in spite of participation by the plaintiff in the very activity which gave rise to his injuries, that is, the supervision and keeping of the track free from dangerous objects. The plaintiff admittedly took part in this function; therefore the defendant did not have sole control of this function, and the inference therefore cannot be made.

C. Conclusion.

Appellee respectfully submits that this Court, in the writing of its Opinion, erred in the respects hereinbefore set forth, and that a rehearing in this matter should be had.

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State of Arizona,
County of Pima—ss.

ARTHUR HENDERSON, being first duly sworn, deposes and says:

That he is a partner in the firm of Knapp, Boyle, Bilby & Thompson, attorneys for appellee in the foregoing matter; that he prepared the appellee's Answering Brief therein, and that he is fully familiar with the law and the facts set forth in the Answering Brief and in the appellee's Opening and Closing Brief, and that he is the attorney who made the oral argument before the above entitled Court.

That he certifies under Rule 25 of this Court that, in his judgment, the above Petition for Rehearing is well founded and that this Petition is not interposed for delay.

ARTHUR HENDERSON

Subscribed and Sworn to before me this 14th day of February, 1951.

WINNIFRED TRUSKY
Notary Public

My Commission Expires:
November 24, 1953

No. 12548

United States
Court of Appeals
For the Ninth Circuit.

See vol 8643

WOODWORKERS TOOL WORKS, a Corpora-
tion,

Appellant,

vs.

WILLIAM J. BYRNE,

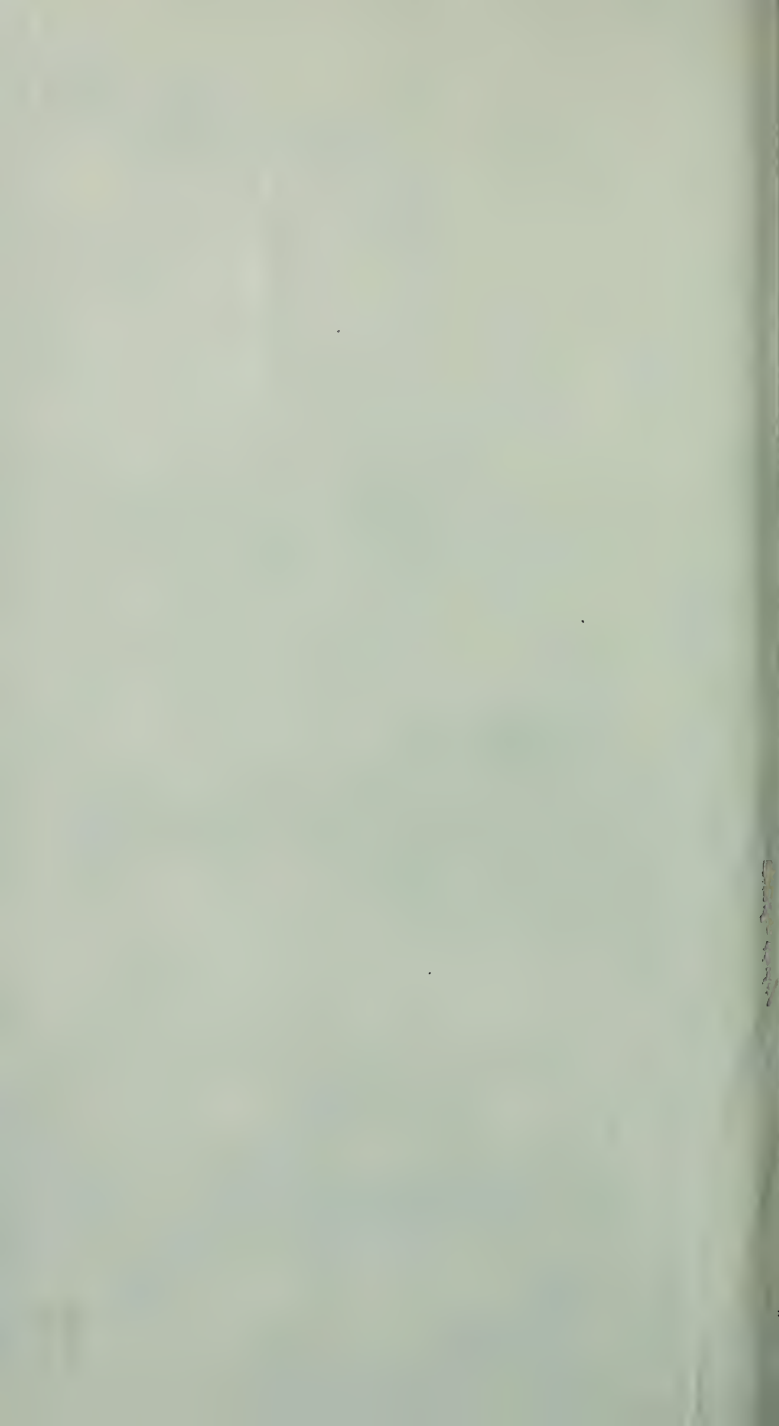
Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED
AUG 18 1950

PAUL P. O'BRIEN,
CLERK



No. 12548

United States
Court of Appeals
For the Ninth Circuit.

WOODWORKERS TOOL WORKS, a Corpora-
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Transcript of Record

Appeal from the United States District Court,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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—cross	267
Townsend, Jerome B.	
—direct	248
—cross	258
—redirect	261

Witnesses, Plaintiff's:

Byrne, William J.

—direct	135, 201
—cross	153, 202
—redirect	163, 172, 208
—recross	171

Cheney, Gough L.

—direct	172
—cross	194
—redirect	197

Chirby, Michael L.

—direct	103
—cross	117
—redirect	124
—recross	126

Detwiler, Dr. Howard F.

—direct	228
—cross	244

Leewenkamp, Cornelius

—direct	127
—cross	133

Selby, George

—direct	77, 94, 99
—cross	90, 101

Sutherland, Dr. Ross

—direct	209
—cross	216
—redirect	217

Townsend, Jerome B.

—direct	263
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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

TRIPP & CALLAWAY,

F. V. LOPARDO,

210 West 7th St.,

Los Angeles 14, Calif.

For Appellee:

JOHN W. OLSON,

639 S. Spring St.,

Los Angeles 14, Calif.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 9134-Y

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a Corpora-
tion,

Defendant.

AMENDED
COMPLAINT FOR PERSONAL INJURIES

Comes Now the plaintiff and complains of de-
fendant above-named and for cause of action al-
leges as follows:

I.

That at all times hereinafter referred to, plaintiff
was and is a resident of the County of Los Angeles,
State of California, and a citizen of the State of
California.

II.

That defendant is and was at all times herein-
after mentioned a corporation, duly organized and
existing by virtue of the laws of the State of Illi-
nois, engaged in manufacturing machine tools, and
in the business of selling machine tools in the State
of California.

III.

That plaintiff is a citizen of the State of Califor-
nia and defendant is a corporation incorporated

under the laws of the State of Illinois. The matter in controversy exceeds, exclusive [3*] of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

IV.

That at all times hereinafter mentioned, plaintiff was regularly employed by E. George Selby, doing business as Selby Company, in the County of Los Angeles, State of California.

V.

That on or about the 23rd day of October, 1948, plaintiff's employer purchased from defendant a new Champion panel raiser head, 11¼ bore, right hand, hereinafter referred to as "panel head," designed, manufactured and sold by said defendant for cutting lumber. That said panel head was installed for use in cutting lumber at the place of business of plaintiff's employer on or about the 26th day of October, 1948, and plaintiff was employed to cut lumber with the same.

VI.

That on the 28th day of October, 1948, as approximately 8:45 a.m. of said day, plaintiff, in the regular course of his employment, was engaged in cutting lumber with said panel head. That at said time and place, said panel head, revolving at hundreds of revolutions per mintue, suddenly broke from structural defects, a piece of which struck plaintiff, directly and proximately causing the injuries and damages to plaintiff hereinafter described.

* Page numbering appearing at bottom of page of original certified Transcript of Record.

VII.

That defendant sold the said panel head to plaintiff's employer for the express purpose of its being used and operated as plaintiff was operating it when injured as aforesaid. That defendant warranted the structural safety of said panel head against breaking and injuring plaintiff.

VIII.

That until plaintiff William J. Byrne was injured as [4] aforesaid, he was a strong, active and healthy man in body and mind.

IX.

That the force and impact of the piece of said panel head as it struck the plaintiff was such as to inflict serious and permanent injuries to plaintiff; that plaintiff suffered severe lacerations of his right hand; that plaintiff has suffered and is still suffering great physical pain and mental stress from said injuries; that at the time of said injury plaintiff was thirty-three (33) years old; that he was earning and capable of earning from Two Hundred and Sixty (\$260.00) Dollars to Two Hundred and Seventy-Five (\$275.00) Dollars per month; that due to said injury plaintiff has been and will be totally disabled from pursuing his usual occupation as a mill worker and will be permanently partially disabled from performing any labor as a mill worker or any work depending upon the full use of his right hand; that ever since the said accident, plaintiff has been under the care of physicians for said injuries and

has incurred medical expenses in the sum of Two Hundred and Fifty (\$250.00) Dollars; that further medical expenses are being incurred by plaintiff as a result of said personal injuries, and plaintiff asks leave of the Court to amend this complaint when the full amount of such medical expenses is ascertainable.

X.

That plaintiff has thus been damaged by the negligence and carelessness of defendant in selling and delivering to plaintiff's employer said structurally defective panel head, and defendant's breach of warranty as to its safety, in the sum of Thirty Thousand (\$30,000.00) Dollars.

Wherefore plaintiff prays judgment against defendant as follows:

1. For the sum of \$30,000.00 as damages. [5]
2. For medical expenses when the total has been ascertained.
3. For costs of suit herein incurred.
4. For such other and further relief as is just and proper.

/s/ JOHN W. OLSON,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed Jan. 26, 1949. [6]

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above-named Defendant:

You are hereby summoned and required to serve upon John W. Olson plaintiff's attorney, whose address is 639 South Spring Street, Los Angeles 14, California, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: January 26, 1949.

EDMUND L. SMITH,
Clerk of Court.

[Seal] By /s/ G. A. SAUNDERS,
Deputy Clerk.

Return of service of Writ attached.

[Endorsed]: Filed February 2, 1949. [8]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS ACTION AND QUASH THE RETURN OF SERVICE OF SUMMONS

The defendant, Woodworkers Tool Works, a corporation, moves the court as follows:

To dismiss the action, or in lieu thereof, to quash the return of service of summons on the grounds:

1. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Illinois and was not and is not subject to service of process within the Southern District of California.

2. That the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of E. H. Preuer and Robert E. Dunne hereto annexed as Exhibits "A" and "B" respectively. [10]

Notice of Motion

Please take notice, that the undersigned will bring the above motion on for hearing before this Court as Room 5, United States Courts and Post Office Building, County of Los Angeles, City of Los Angeles, on the 14th day of March, 1949, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: February 24, 1949.

TRIPP & CALLAWAY,

By /s/ ROBERT E. DUNNE,

Attorneys for Defendant. [11]

Points and Authorities

1. The following defenses may be made by motion: (a) lack of jurisdiction over the person; (b)

insufficiency of process; (c) insufficiency of service of process:

Rule 12b, Fed. Rules of Civil Proc.

Mas v. Owens-Illinois Glass Co., 34 Fed. Supp. 415.

Cannon v. Time, Inc., et al., 115 Fed. (2d) 423.

Hedrick v. Canadian Pacific Railway Co., 28 Fed. Supp. 257.

2. Service of summons and complaint upon a foreign corporation must be made by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process; or service must be made in the manner prescribed by a statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

Rule 4d (3) (7) of the Fed. Rules of Civil Proc.

Mas v. Owens-Illinois Glass Co., Supra;

Cannon v. Time, Inc., et al., Supra;

Hedrick v. Canadian Pacific Railway Co., Supra.

3. Where defendant is a foreign corporation, validity of service depends on whether the corporation was doing business in such manner and to such

extent as to warrant inference that, through its agents, it was present in the district.

Hinchcliffe Motors Inc. v. Willys-Overland
Motors Inc. 30 Fed. Supp. 580; [12]
Mas v. Owens-Illinois Glass Co., Supra;
Cannon v. Time, Inc., et al., Supra;
Hedrick v. Canadian Pacific Railway Co.,
Supra. [13]

EXHIBIT A

In the District Court of the United States, in and
for the Southern District of California, Central
Division

Civil Action No. 9134-Y

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a corpora-
tion,

Defendant.

AFFIDAVIT OF E. H. PREUER

State of California,
County of Los Angeles—ss.

E. H. Preuer being first duly sworn, deposes and
says: That he is the sole owner of Woodworkers
Supply Company, 1222 Santa Fe Avenue, Los An-
geles, California; that on or about the 27th day of
January, 1949, he was served with a copy of sum-

mons and complaint in the above-entitled action; that he is not an officer, a managing or general agent, or an agent authorized by appointment or law to receive service of process for and/or on behalf of Woodworkers Tool Works, a corporation, which is a corporation organized and existing under and by virtue of the laws of the State of Illinois.

Further affiant sayeth not.

/s/ E. H. PREUER.

Subscribed and sworn to before me this 25th day of Feb. 1949.

/s/ Illegible,

Notary Public in and for said County and State.

EXHIBIT B

In the District Court of the United States, in and for the Southern District of California, Central Division

Civil Action No. 9134-Y

WILLIAM J. BYRNE,

Platintiff,

vs.

WOODWORKERS TOOL WORKS, a corporation,

Defendant.

AFFIDAVIT OF ROBERT E. DUNNE

State of California,
County of Los Angeles—ss.

Robert E. Dunne, being first duly sworn, deposes

and says: That he is one of the counsel for defendant, Woodworkers Tool Works, a corporation organized and existing under and by virtue of the laws of the State of Illinois; that up to and including the date of this affidavit neither said defendant, nor any of its agents or employees, have been served with process in the above-entitled action; that said defendant was not at the time of the service of process upon E. H. Preuer, and is not now, doing business in the State of California so as to render it amenable to the service of process in this action.

/s/ ROBERT E. DUNNE.

Subscribed and sworn to before me this 25th day of Feb., 1949.

/s/ ELIZABETH P. WILLIAMS,
Notary Public in and for said County and State.

Affidavit of service by Mail attached.

[Endorsed] Filed February 28, 1949. [15]

[Title of District Court and Cause.]

AFFIDAVIT OF RAY TAYLOR

State of California,
County of Los Angeles—ss.

Ray Taylor being first duly sworn deposes and says that he is employed by Pacific Employers Insurance Company of Los Angeles, California in the capacity of investigator. During the course of his

employment, he had reason to investigate the circumstances surrounding the sale to the Selby Company by Woodworkers Tool Works of a Champion Panel Head 1¼ bore, right hand. That affiant visited the Selby Company, purchasers of the said panel head and also visited the Woodworkers Supply Company of Los Angeles, and there interviewed the employees of the supply company and Mr. E. H. Preuer, owner of the Woodworkers Supply Company; that affiant was informed and his investigation revealed that the Selby Company, through their manager, William R. Walker, called the Woodworkers Supply Company [19] and asked that they send a representative to the Selby plant. That a representative by the name of Jack Townsend visited the Selby Company in response to the said request of William R. Walker, and there showed Mr. William R. Walker a catalog of the Woodworkers Tool Works, an Illinois corporation, and that Mr. Walker ordered the said panel head from the said catalog through Mr. Townsend. That a purchase order was signed by the Selby Company to the Woodworkers Supply Company and an invoice was prepared by the Woodworkers Supply Company for the purchase of said panel head. That the said panel head was delivered air express by the Woodworkers Tool Works directly and that the Woodworkers Supply Company billed the Selby Company for said panel head directly. Said invoice was sent to the Selby Company by the Woodworkers Supply Company, a copy of which is attached hereto

and made a part of this affidavit. Affiant was informed by Mr. Preuer that Woodworkers Supply Company keeps in its place of business a catalog of Woodworkers Tool Works and affiant saw the said catalog; that on the face of the said catalog are the words "Woodworkers Tool Works" and their Chicago address; that affiant's investigation revealed that Woodworkers Supply Company represented Woodworkers Tool Works throughout this complete sales transaction, and that at no time did Selby Company directly contact Woodworkers Tool Works about the same; that all contacts were exclusively through the Woodworkers Supply Company.

/s/ RAY F. TAYLOR.

Subscribed and sworn to before me this 15th day of March, 1949.

[Seal] /s/ RUTH D. FISHER,
Notary Public in and for said county and state.

INVOICE

WOODWORKERS' SUPPLY CO.

Woodworking Machinery and Supplies
 1222 Santa Fe Avenue Phone Vandike 4127
 Los Angeles 21, California

Date October 25, 1948

Terms net 10th prox-net 30 days

Your Order No. 1957

Your Requisition No.....

Our Order No. 15761

1—Champion Panel Head 1¼" bore right	
hand sold f.o.b. Chicago, Ill.....	\$75.00
sales tax 2½%.....	1.88
	<hr/>
	\$76.88

shipped directly to customer from factory
 10-23-48 air express

2 telephone calls at customers	2.79
request 10-12 and 10-19.....	3.94
	<hr/>
	\$83.61

2—telegrams—no charge

Approved For Payment.....

Do not Pay this was defective head.

/s/ JAS.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM R. WALKER

State of California,
County of Los Angeles—ss.

William R. Walker being first duly sworn, deposes and says:

That during the month of October, 1948, and some time prior thereto, he was employed by the Selby Company and worked at said Selby Company in the capacity of manager;

That on or about October 23, 1948, affiant, in his capacity as manager of said Selby Company, determined that the said company was in urgent need of a Champion Panel Head, 1 $\frac{1}{4}$ bore, right hand, and that thereupon affiant telephoned the Woodworkers Supply Company and requested that they send a salesman to see him;

That thereafter a salesman from the Woodworkers Supply Company, whose name is Jack Townsend, visited affiant at the [21] Selby Company's place of business, and brought with him a catalog upon which appeared the words "Woodworkers Tool Works" and affiant ordered a panel head from said catalog and at said time was informed by said salesman, Jack Townsend, that the Champion panel head ordered was manufactured by the Woodworkers Tool Works, an Illinois corporation, and that he, as salesman for Woodworkers Supply Company, represented the Woodworkers Tool Works.

At said time and place, affiant or his employer,

Jim Selby, signed a purchase order to the Woodworkers Supply Company, and the Woodworkers Supply Company thereupon ordered said panel head from the Woodworkers Tool Works, which was shipped direct to the Selby Company from the Woodworkers Tool Works by Air Express on October 23rd, 1948. That said Selby Company was billed by the Woodworkers Supply Company in the total amount of \$83.61, said sum representing the purchase price of \$75.00, \$1.88 tax, and \$6.73 representing two telephone calls to Woodworkers Tool Works from Woodworkers Supply Company.

That to affiant's own personal knowledge said Selby Company, through affiant, has ordered other products from Woodworkers Tool Works through the Woodworkers Supply Company.

/s/ WILLIAM R. WALKER.

Subscribed and sworn to before me this 15th day of March, 1949.

[Seal] /s/ RUTH D. FISHER,
Notary Public in and for said County and State.

Frank M. Jordan,
Secretary of State

Office of the Secretary of State
State of California, Sacramento 3

December 17, 1948

Olson, Olson & Olson, Attorneys,
639 South Spring Street,
Los Angeles 14, California.

Attention: Mr. John W. Olson.

Dear Sir:

In reply to your letter of December 15th we advise that we find no record in this office of a corporation named Woodworkers Tool Works.

No designation of agent for service of process has been filed in this office by a corporation of said name.

Very truly yours,

/s/ FRANK M. JORDAN, EB
Secretary of State.

EB [23]

Points and Authorities

1. "Service of summons and complaint upon a foreign corporation must be made by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other

agent authorized by appointment or by law to receive service of process.....”

Rule 4d (3) (7) of the Fed. Rules of Civil Proc.

2. “A federal district court has jurisdiction over suits between citizens of different states but to obtain that jurisdiction there must be valid service on defendant within the district and where defendant is a foreign corporation. Validity of service depends on whether the corporation was doing business in such a manner and to such extent as to warrant inference that, through its agents, it was present in the district.”

Hinchcliffe Motors, Inc. v. Willys-Overland Motors, Inc., 30 Fed. Supp. 580.

3. “The rationale of all rules for service of process on corporations is that service must be made on a representative so integrated with the corporation sued as to make it a priori supposable that he will realize his responsibilities and know what he should do with any legal papers served upon him.”

Operative Plasterers & Cement Finishers International Association of the U. S. & Canada v. Case. 93 Fed. II 56.

4. “A service of summons and complaint on a sales representative of a foreign corporation which was not registered in the state and which had not appointed an agent upon whom service could be made but which sold its products within the state through representatives who were paid on a commission basis and who maintained [24] offices which

were identified by name of the corporation was a valid service upon that corporation.”

Fort Wayne Corrugated Paper Co. v. Anchor.
Hocking Glass Corp. 31 Fed. Supp. 403.

5. “Here was a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of the Harvester Co. were delivered in the State of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky but might there receive payment in money, checks or drafts.”

International Harvester Co. of America v.
Commonwealth of Kentucky. 234 U. S. 579.

6. “The persistent efforts of foreign corporations to evade service of jurisdictional processes in the states has led some courts to suggest the application of a practical test, that where the defendant corporation’s local activities justify it, the defendant be drawn from its home state as in this case, upon the grounds of fairness; instead of sending plaintiff to Virginia or Illinois to try its case, bring defendant here.”

Moore Machinery Co. v. Stewart Warner
Corporation 27 Fed. Supp. 526 (Cal.)

7. “The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority in him; and if he be that kind of an agent, the implication will be made (of authority) notwithstanding a denial of

authority on the part of the other officers of the corporation.”

Connecticut Mutual Life Ins. Co. v. Spratley
172 U. S. 602.

8. “We hold the true rule to be * * * that every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made.”

Roehl v. Texas Co. 107 C A 691 (704).

9. “I think that when a foreign corporation not only accepts orders, but fills the same and receives the pay therefore through the instrumentality of an agent located within this state it should for all reasonable and practicable purposes be said to have come here. To the extent of such activities it is doing all that it could do if it had here opened an office under its own name. The facts disclosed are sufficient to bring the case within the authority of International Harvester.”

Davis v. Motive Parts Corp. 16 Fed II 148.

In accord:

Milbank v. Standard Motor Construction Co.
22 Pac. II 271.

The Thew Shovel Co. v. Superior Court 35
CA II 183.

American Asphalt Roof Corp. v. Shanlaland
219 N W 28.

60 A L R at Page 1030.

Affidavit of service by Mail attached.

[Endorsed]: Filed March 16, 1949. [26]

At a stated term, to wit: The February Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 21st day of March in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

ORDER

For hearing motion of defendant filed Feb. 28, 1949, to dismiss the action and quash service of summons; John W. Olson, Esq., appearing as counsel for plaintiff; R. E. Dunne, Esq., appearing as counsel for defendant; said attorneys argue to the Court;

Court orders said motion denied, and that defendant have 20 days to answer. [28]

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT
FOR PERSONAL INJURIES

Comes Now the plaintiff and complains of defendant above-named and for cause of action alleges as follows:

I.

That at all times hereinafter referred to, plaintiff was and is a resident of the County of Los Angeles, State of California, and a citizen of the State of California.

II.

That defendant is and was at all times hereinafter mentioned a corporation, duly organized and existing by virtue of the laws of the State of Illinois, engaged in manufacturing machine tools, and in the business of selling machine tools in the State of California.

III.

That plaintiff is a citizen of the State of California, [29] and defendant is a corporation incorporated under the laws of the State of Illinois. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

IV.

That at all times hereinafter mentioned, plaintiff was regularly employed by E. George Selby, doing business as Selby Company, in the County of Los Angeles, State of California.

V.

That on or about the 23rd day of October, 1948, plaintiff's employer purchased from defendant a new Champion panel raiser head, 1¼ bore, right hand, hereinafter referred to as "panel head," designed, manufactured and sold by said defendant for cutting lumber. That said panel head was installed for use in cutting lumber at the place of business of plaintiff's employer on or about the 26th day of October, 1948, and plaintiff was employed to cut lumber with the same.

VI.

That defendant sold the said panel head to plaintiff's employer for the express purpose of its being used and operated as plaintiff was operating it when injured as hereinafter described. That defendant impliedly warranted the structural safety of said panel head against breaking and injuring plaintiff.

VII.

That on or about the 28th day of October, 1948, at approximately 8:45 a.m. of said day, plaintiff, while relying upon said implied warranty and while in the regular course of his employment, was engaged in cutting lumber with said panel head. That at said time and place, said panel head, revolving at hundreds of revolutions per minute, suddenly broke from structural defects, a piece of which struck plaintiff, directly and proximately causing the injuries and damages to plaintiff hereinafter described.

VIII.

That until plaintiff William J. Byrne was injured as aforesaid, he was a strong, active and healthy man in body and mind.

IX.

That the force and impact of the piece of said panel head as it struck the plaintiff was such as to inflict serious and permanent injuries to plaintiff; that plaintiff suffered severe lacerations of his right hand; that plaintiff has suffered and is still suffering great physical pain and mental stress from said injuries; that at the time of said injury plaintiff was thirty-three (33) years old; that he was earning and capable of earning from Two Hundred and Sixty (\$260.00) Dollars to Two Hundred and Seventy-Five (\$275.00) Dollars per month; that due to said injury, plaintiff has been and will be totally disabled from pursuing his usual occupation as a mill worker and will be permanently partially disabled from performing any labor as a mill worker or any work depending upon the full use of his right hand; that ever since the said accident, plaintiff has been under the care of physicians for said injuries and has incurred medical expenses in the sum of Two Hundred and Fifty (\$250.00) Dollars; that further medical expenses are being incurred by plaintiff as a result of said personal injuries, and plaintiff asks leave of the Court to amend this complaint when the full amount of such medical expenses is ascertainable.

X.

That plaintiff has thus been damaged by defendant's having sold and delivered to plaintiff's employer said structurally defective panel head, and defendant's breach of warranty as to its safety, in the sum of Thirty Thousand (\$30,000.00) Dollars.

For a Second, Separate and Further Cause of Action, plaintiff complains of defendant above named and alleges as follows:

I.

That the allegations contained in paragraphs I, II, III, IV and V of plaintiff's first cause of action herein are true and correct, and are hereby incorporated with the same force and effect as though fully set forth herein.

II.

That defendant was negligent and careless in the manufacture, sale and delivery to plaintiff's employer of a structurally defective panel head.

III.

That on the 28th day of October, 1948, at approximately 8:45 a.m. of said day, plaintiff, in the regular course of his employment, was engaged in cutting lumber with said panel head. That at said time and place, said panel head, revolving at hundreds of revolutions per minute, suddenly broke from structural defects, a piece of which struck plaintiff, directly and proximately causing the injuries and damages to plaintiff hereinafter described.

IV.

That the allegations contained in paragraphs VIII and IX of plaintiff's first cause of action herein are true and correct, and are hereby incorporated with the same force and effect as though fully set forth herein.

V.

That as a direct and proximate result of defendant's negligence and carelessness in manufacturing, selling and delivering a structurally defective panel head to plaintiff's employer, plaintiff has been damaged in the sum of Thirty Thousand (\$30,000.00) Dollars. [32]

Wherefore plaintiff prays judgment against defendant as follows:

1. For the sum of \$30,000.00 as damages.
2. For medical expenses when the total has been ascertained.
3. For costs of suit herein incurred.
4. For such other and further relief as is just and proper.

/s/ JOHN W. OLSON,
Attorney for Plaintiff.

Duly verified.

Affidavit of service by Mail attached.

[Endorsed]: Filed April 5, 1949. [33]

[Title of District Court and Cause.]

ANSWER TO SECOND AMENDED
COMPLAINT

Comes now the defendant Woodworkers Tool Works, a corporation, and for answer to the second cause of action of plaintiff's second amended complaint alleges, admits and denies:

I.

Answering paragraph I of this cause of action:

A. This answering defendant has no information or belief upon the subject sufficient to enable it to answer paragraph I and IV incorporated therein and upon this ground denies generally and specifically each, every and all of the allegations in the said paragraphs contained.

B. Answering the incorporated paragraph II of this cause of action defendant admits that it was and is a corporation duly organized and existing by virtue of the laws of the state of Illinois engaged in the manufacturing machine tools, but denies that it is in the business of selling machine tools in the state of Calif. [35]

C. Answering the incorporated paragraph III of this cause of action defendant admits that it is a corporation incorporated under the laws of the state of Illinois; further answering said paragraph this answering defendant alleges that it has no information or belief sufficient to enable it to answer

the remaining allegations in said paragraph contained and upon that ground denies generally and specifically each, every and all of the remaining allegations.

D. Answering the incorporated paragraph V defendant admits that it sells Champion panel raiser heads; that it partially manufactured said article, but alleges in this connection that it did not cast the said raiser head nor any part thereof; denies that plaintiff's employer purchased said Champion panel raiser head from this defendant; further answering said incorporated paragraph V defendant has no information or belief sufficient to enable it to answer the remaining allegations in said paragraph contained and upon that ground denies generally and specifically each, every and all of the remaining allegations.

II.

This answering defendant denies generally and specifically each, every and all of the allegations set forth in paragraph II and in this connection alleges that this defendant did not sell the Champion panel raiser head to plaintiff's employer.

III.

This answering defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the remaining allegations in said complaint contained, and upon this ground denies generally and specifically:

(a) Each, every and all of the allegations con-

tained in paragraphs III, IV, V and the paragraphs incorporated in paragraph IV of said second cause of action, and not hereinbefore specifically admitted.

(b) That the plaintiff, through the happening of said alleged, or any, accident:

(1) Was injured or damaged in the manner or to the extent alleged, or in any other manner, or to any extent, or at all.

(2) Suffered damages in the sums alleged in paragraph V or in paragraph IX, which is incorporated in paragraph IV of this cause of action, or in any other sums, or at all.

(3) Was obliged to incur or did incur medical expenses in the sum alleged in the said incorporated paragraph IX, or in any other sum, or at all; or that plaintiff will be required to expend additional sums for his future care as alleged in said paragraph IX, or in any other sum, or at all.

(4) Suffered a total disability as alleged in the said incorporated paragraph IX, or in any other manner, or at all; that plaintiff suffered, or will suffer a partial disability as alleged, or in any other manner, or at all.

(5) Suffered a loss in his earnings as alleged in said incorporated paragraph IX, or in any other sum, or at all.

(c) That plaintiff was capable of earning, or was earning at the time of said alleged, or any, accident, the sums specified in said incorporated paragraph IX, or any sum, or at all.

(d) Each, every and all of the allegations in said cause of action contained, and not hereinbefore admitted or denied.

IV.

That the said alleged accident, or injury, or damage, or either or any thereof, was caused or occasioned, or in any manner contributed to by the said, or any, carelessness, negligence, fault or liability on the part of this answering defendant, its agents or employees, or either or any of them.

Further Answering Plaintiff's Second Amended Complaint, [37] and by Way of a First, Separate and Affirmative Defense to the Second Cause of Action Therein Contained, Defendant Alleges:

I.

This answering defendant is informed and believes, and upon such information and belief alleges, that at the time and place mentioned in said complaint, the plaintiff failed to govern and control his movements in a reasonable manner commensurate with the alleged existing conditions, and by his failure to exercise ordinary care and caution, as aforesaid, for his own safety or welfare, or to avoid the happening of said alleged accident, injury or damage, if any, did thereby directly and proximately contribute to the happening of said alleged accident, injury or damage complained of, and to each and all and the whole thereof.

Further Answering Plaintiff's Second Amended Complaint, and by Way of a Second, Separate and Affirmative Defense to the Second Cause of Action Therein Contained, Defendant Alleges:

I.

That the said alleged accident, or injury, or damage or either or any thereof, was an unavoidable accident and was not caused or occasioned, or in any manner contributed to, by the said, or any, carelessness, negligence, fault or liability on the part of this answering defendant, its agents or employees, or either or any of them.

Wherefore, this answering defendant prays that plaintiff take nothing by his second amended complaint, that this defendant have judgment for its costs herein incurred, and for such other and further relief as to the court may seem proper.

TRIPP & CALLAWAY,

By /s/ ROBERT E. DUNNE,
Counsel for Defendant.

Duly verified.

Copy received.

[Endorsed]: Filed May 2, 1949. [38]

[Title of District Court and Cause.]

MOTION TO DISMISS PLAINTIFF'S FIRST
COUNT OR CAUSE OF ACTION OF THE
SECOND AMENDED COMPLAINT AND
FOR A MORE DEFINITE STATEMENT.

Comes now the defendant Woodworkers Tool Works, a corporation, and files this its Motion to Dismiss Plaintiff's First Count or Cause of Action of the Second Amended Complaint and for a More Definite Statement and for grounds of dismissal therefor states:

I.

The said first count or cause of action of the Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

And For Grounds For A More Definite Statement
States:

II.

The first count or cause of action of the Second Amended Complaint fails to state where the purported purchase of the Champion panel raiser head was consummated. [40]

III.

The first count or cause of action is so unintelligible, ambiguous and contradictory in its entirety that the defendant is unable to properly and fairly answer the same.

Said Motion to Dismiss and the Motion for More Definite Statement will be made and based upon all of the files, papers and proceedings in this cause, including said Second Amended Complaint, this motion, and the notice of the hearing thereof, and upon the brief in support of this motion filed and served herewith.

Dated: Los Angeles, California, April 30, 1949.

TRIPP & CALLAWAY,

By /s/ ROBERT E. DUNNE,
Counsel for Defendant.

Receipt of Copy attached.

[Endorsed]: Filed May 2, 1949. [41]

[Title of District Court and Cause.]

NOTICE OF MOTION

To: William J. Byrne, the plaintiff above-named,
and to John W. Olson, 639 South Spring Street,
Los Angeles 14, California, his attorney:

You, and Each of You, Will Please Take Notice that the undersigned will bring the attached Motion to Dismiss Plaintiff's First Count or Cause of Action and For A More Definite Statement on for hearing before this Court in the Court Room of the Honorable Leon R. Yankwich, Judge of the above-entitled Court, located in Court Room 5 of the Federal Building, 312 North Spring Street, in the City

and County of Los Angeles, State of California, on the 16th day of May, 1949, at 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard.

Dated: Los Angeles, California, April 30, 1949.

TRIPP & CALLAWAY,

By /s/ ROBERT E. DUNNE,
Counsel for Defendant.

Receipt of Copy attached.

[Endorsed]: Filed May 2, 1949. [43]

United States District Court, Southern District of
California, Central Division

No. 9134-Y

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a Corpora-
tion,

Defendant.

Honorable Leon R. Yankwich, Judge.

DECISION ON MOTIONS

The various motions of the defendant heretofore argued and submitted are now decided as follows:

I.

The motion of the defendant to dismiss the plaintiff's first count or cause of action of the Second Amended Complaint is hereby granted.

II.

The motion of the defendant for a more definite statement of the first count or cause of action of the Second Amended Complaint is hereby denied.

The plaintiff may have ten days within which to amend, if so advised.

Comment

The first count of the Second Amended Complaint seeks recovery on the basis of warranty. It is distinctly [45] alleged that the defendant sold the panel head to plaintiff's employer "for the express purpose of its being used and operated as plaintiff was operating it when injured as aforesaid. That defendant warranted the structural safety of said panel head against breaking and injuring plaintiff."

As our jurisdiction stems from diversity, the matter is governed strictly by California law. (*Meredith v. Winter Haven*, 1943, 320 U. S. 228). And the law of California makes liability dependent in such cases on negligence and not on warranty. (Cal. Civil Code, sec. 1735.)

(*Kalash v. Los Angeles Ladder Co.*, 1934, 1 Cal. 2d 229; *Escola v. Coca Cola Bottling Co.*, 1944, 24 C. 2d 452): Counsel for the plaintiff has pressed upon us the views of Mr. Justice Traynor in the *Escola* case. However, we cannot follow them because they

are his personal views and not those of the Court. The main opinion written by Mr. Chief Justice Gibson has the concurrence of four of the Justices, more than a majority of the Court. At times when a concurring opinion is necessary in order to reach a majority, its reasoning may have force. But when a majority of the Court has decided a case upon one ground, the views of any minority contained in a concurrent opinion loses all significance. The opinion of Mr. Justice Traynor shows clearly that he is not satisfied with the ground upon which the majority based their decision. Indeed, the first paragraph of his opinion reads:

“I concur in the judgment, but I beileve the manufacturer’s negligence should no longer be singled out as the basis of a plaintiff’s right to recover in cases like the present one.”

(Emphasis added.)

It is evident, therefore, that by his concurring opinion, he sought to base liability upon broader grounds [46] than those contained in the majority opinion. Regardless of the strength of these views, we are bound to follow the California law as declared by the highest court and that view, as expressed in this case, does not sanction action on the basis of warranty. It merely sanctions recovery on the basis of negligence.

Hence the ruling above made.

Dated this 1st day of August, 1949.

/s/ LEON R. YANKWICH,

[Endorsed]: Filed August 1, 1949. [47]

[Title of District Court and Cause.]

STIPULATION RE DEPOSITION

It Is Hereby Stipulated by and Between the parties to the above-entitled action, through their respective attorneys, that Woodworkers Tool Works, an Illinois Corporation, with its principal office at 222 South Jefferson, Chicago 6, Illinois, may take the deposition of its Vice President, William J. Knourek, 820 William Street, River Forest, Illinois, and its shop superintendent, Charles Meissner, 10037 South Wallace, Chicago, Illinois, at Room 1325, Number I, North LaSalle Street, Chicago, Illinois, before Peter V. Kuhn, a duly authorized Notary Public, or any other duly authorized officer before whom depositions may be taken, on February 7, 1950, at 4 o'clock p.m.

Dated: January 27th, 1950.

/s/ JOHN W. OLSON,
Attorney for Plaintiff.

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,
Attorneys for Defendant.

[Endorsed]: Filed January 30, 1950. [48]

[Title of District Court and Cause.]

REQUESTED JURY INSTRUCTIONS
REFUSED BY THE COURT

Refused:

/s/ LEON R. YANKWICH,
Judge. [49]

DEFENDANTS REQUESTED
JURY INSTRUCTIONS

Defendants' Requested Instruction No. ...

When in the manufacture of such an article as the Panel Raiser Head here involved there is used any material or part obtained from a source outside the manufacturing plant in question, it is the duty of the manufacturer to make such inspections and tests of that imported material or part as ordinary prudence would indicate to be necessary, to the end that the safety of the finished article for the intended or invited use will be reasonably certain. Failure to fulfill that duty is negligence. On the other hand, if the manufacturer performs that duty, and the inspections and tests do not indicate a defective or dangerous condition, and it does not know of such a condition, it is not liable for injury resulting from its use of such material or part, although it prove to be defective.

Based on Instruction Number 218 in the book of
Approved Jury Instructions.

B A J I.

O'Rourke vs. Day & Night Water Heater Co.,
31 C. A. (2d), 364.

Y

Given

Given as Modified

Rejected.....

[51]

Defendants' Requested Instruction No. ...

You are hereby instructed that the reasonable-
ness of the inspections necessary to determine
whether a manufactured article is safe for use
varies with the circumstances of each case, and the
purpose for which the article is intended must be
considered, that is to say, that a manufactured
article need not be absolutely safe for all purposes
but only for the purpose for which it was manu-
factured; therefore, if you find that the defendant
properly made inspections reasonable designed to
find defects which would render the Panel Raiser
Head unsafe for cutting and trimming wood, you
must find that those inspections were reasonable;
and if you find that the said inspections did not
reveal any such defects in the Panel Raiser Head,
then you must find that the defendant was not

negligent in the manufacture of the Panel Raiser Head.

O'Rourke vs. Day & Night Water Heater Co.,
31 C. A. (2d), 364.

Y

Given	
Given as Modified	
Rejected.....	[52]

Defendants' Requested Instruction No. ...

You are hereby instructed that if you find that the defendant used the machinery, methods and processes, which are accepted as standard in the trade and which are as reliable and satisfactory as any others in the manufacture of such an article, it did not fail in the exercise of proper care.

Gerber v. Faber, 54 C. A. (2d), 674 at 680.

Given	
Given as Modified	
Rejected.....	[53]

Defendants' Requested Instruction No. ...

You are hereby instructed that reasonable care is making the inspections and tests during the course of manufacture which the manufacturer should recognize as reasonably necessary to secure the production of a reasonably safe article; therefore, if you find that the defendant properly inspected the casting which it purchased from another manufacturer, and if you find that the defendant properly inspected the completed Panel Raiser Head you

must find that defendant exercised reasonable care.

Gerber v. Faber, 54, C. A. (2d), 674 at 680.

Y

Given

Given as Modified

Rejected..... [54]

INSTRUCTIONS TO THE JURY REQUESTED BY PLAINTIFF

To The Honorable Leon R. Yankwich, Judge of
Said Court:

Counsel for plaintiff respectfully requests the
attached instruction to the jury in the above-entitled
action.

.....

John W. Olson,
Attorney for Plaintiff. [55]

Plaintiffs Instruction Number

You are instructed that, under the uncontradicted
evidence in this case, the Plaintiff, William J.
Byrne, is entitled to a verdict and you are, there-
fore, instructed to return a verdict against the
defendant and in favor of the Plaintiff William J.
Byrne for such sum as damages as you may find
from a preponderance of the evidence that he should
be awarded, measured by the Court's instructions.

Given

Given as Modified

Not Given [56]

Plaintiffs Instruction Number

It is alleged in the answer of defendant that any injury sustained by the plaintiff was directly, proximately and concurrently contributed to be negligence and recklessness on the part of the plaintiff.

There is no evidence of contributory negligence on the part of plaintiff and you are instructed to find that issue in favor of plaintiff.

Y

Given

Not Given

[57]

Given as Modified

Plaintiffs Instruction Number

You are instructed that the proximate cause of an injury is that cause which produces the injury and without which the result would not have occurred. It is the cause that sets in operation the factors that accomplish the injury.

If you find that plaintiff was injured as alleged, and that his injury occurred as a consequence of defendant's negligence as alleged; that is, if it set in operation the factors that accomplished the injury, then you will find that defendant's negligence was the proximate cause of the injury.

Y

Given

Given as Modified

Not Given

[58]

Plaintiffs Instruction Number

You are instructed that if the defective condition of the part could have been disclosed by reasonable inspection and tests and such tests and inspections were omitted, then the defendant has been negligent. You are further instructed that reasonable care under this instruction consists of making inspections and tests during the course of manufacture, and after the article was completed which the manufacturer should recognize were reasonably necessary to secure the production of a safe article considering the nature of the article and the purpose for which it was to be used.

O'Rourke vs. Day and Night Water Heater Company, Ltd., 31 Cal. App. (2d) 364 88 Pac. (2) 191.

Smith vs. Peerless Glass Company, Inc., 259 N. Y. 292 (181 N. E. 576).

Y

Given

Given as Modified

Not Given

[59]

Plaintiffs Instruction Number

You are instructed that the degree of care necessary to be exercised by a manufacturer in the production of a product varies with the danger to be expected from the product, and you are further instructed that the kind of inspection called for on

the part of the manufacturer varies with the nature and danger of the thing inspected.

- O'Rourke vs. Day and Night Water Heater Co., Ltd., 31 Cal. App. (2d) 364.
- McPherson vs. Buick Motor Company, 217 N. Y: 382.

Y

Given	
Given as Modified	
Not Given	[60]

Plaintiff's Instruction No. ...

There is in our law a doctrine applying to negligence cases which is commonly known as the doctrine of "res ipsa loquitur." Literally translated from the Latin, this means "the thing speaks for itself".

That doctrine means that if a subject matter is shown by the evidence to have been manufactured and supplied for a particular use, and an injury to some person results from such usage, which would not have occurred in the ordinary course of things, if ordinary and proper care had been used in its manufacture, the thing or subject matter speaks for itself and the law raises the presumption that the manufacturer did not use ordinary and proper care in its production. The burden would then be on the manufacturer to substantially prove that ordinary and proper care was used in the manufacturing and supplying of such subject matter. However, the manufacturer is not responsible for defects

that cannot be found by a reasonable, practicable inspection.

[Underscored lines in pencil—alterations on original typed copy.]

Gladys Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. II, 453.

Sheward, et al. v. Virtue, et al., 20 Cal. II, 410, 126 Pac. II, 345.

McKinney v. Digest, Vol. 17, p. 74.

Rafter v. Dubrock's Riding Academy, 75 Cal. App. II, 621.

Y [61]

Plaintiffs Instruction Number

From the happening of the accident involved in this case, as established by the evidence, unless overcome by contrary evidence or inferences from such evidence, there arises the inference that the proximate cause of the occurrence was negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff.

[Underscored lines are pencil alterations on original typed copy.]

Y

Given

Given as Modified

Not Given

Plaintiff's Instruction No....

In this case if you find from the evidence that plaintiff was injured by the disintegrating or breaking apart of the appliance in question, described as a "Panel Raiser Head" while plaintiff was employed in connection with its use for the purpose for which it was manufactured and supplied and if you further believe from the evidence that this accident and injury would not have occurred if the Panel Raiser Head had been properly manufactured and constructed and ordinary and proper care had been used in its manufacture, and that the accident was not due to faulty installation or operation, over which the defendant had no control, you are instructed that these facts would raise a presumption of negligence on the part of defendant in failing to use ordinary and proper care in the manufacturing and supplying of the Panel Raiser Head. The burden of proof would then be on the defendant to overcome this presumption and free itself from the charge of negligence by substantially proving that it did use ordinary and proper care in that respect.

[Underscored lines are pencil alterations on original typed copy.]

Gladys Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. II, 453.

Sheward, et al. v. Virtue, et al., 20 Cal. II, 410, 126 Pac. II, 345.

McKinney v. Digest, Vol. 17, p. 74.

Rafter v. Dubrock's Riding Academy, 75 Cal. App. II, 621.

Plaintiff's Instruction No. . . .

The uncontradicted evidence and admission of the parties in this case are that the appliance or instrumentality called a Panel Raiser Head was manufactured and supplied by defendant, and that the plaintiff suffered personal injury while employed in connection with its operation when it disintegrated or broke apart.

If you believe from the evidence that plaintiff was injured while employed in connection with the use of the Panel Raiser Head and that the injury he complains of in this action was directly and proximately caused by the disintegrating or breaking apart of the Panel Raiser Head while the same was being used for the purpose for which it was manufactured and supplied and if you further believe from the evidence that the Panel Raiser Head disintegrated or broke apart because of defects due to negligence of defendant to use ordinary and proper care in manufacturing and supplying it, then it will be your duty to return a verdict for plaintiff.

Gladys Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. II, 453.

Sheward, et al. v. Virtue, et al., 20 Cal. II, 410, 126 Pac. II, 345.

McKinney v. Digest, Vol. 17, p. 74.

Rafter v. Dubrock’s Riding Academy, 75 Cal.
App. II, 621.

Given	
Given as Modified	
Not Given	[64]

Plaintiff’s Instruction No. ...

The uncontradicted evidence in this case is that the Panel Raiser Head in question was manufactured and supplied by the defendant. That it disintegrated or broke apart while it was being used for the purpose for which it was manufactured and sold by the defendant. That such an accident does not ordinarily occur in such use of a Panel Raiser Head properly constructed.

You are therefore instructed that these facts raise the presumption that defendant did not use ordinary and proper care in the manufacturing of the Panel Raiser Head and that the burden is on the defendant to overcome this presumption and free itself from the charge of negligence by substantially proving that ordinary and proper care was used in the manufacturing of the Panel Raiser Head.

Gladys Escola v. Coca Cola Bottling Co. of
Fresno, 24 Cal. II, 453.
Sheward, et al. v. Virtue, et al., 20 Cal. II,
410, Pac. II, 345.
McKinney v. Digest, Vol. 17, p. 74.

Rafter v. Dubrock's Riding Academy, 75 Cal.
App. II, 621.

Given

Given as Modified

Not Given

[65]

Plaintiffs Instruction Number

You are instructed that general damages are such as the law implies or presumes to have occurred from the wrong complained of, or such as naturally or ordinary follow the wrong complained of. They are such as will compensate the party injured reasonably for any pain, discomfort and anxiety suffered by him, and proximately resulting from the injury in question, and for such pain, discomfort and anxiety, if any, as he is reasonably certain to suffer in the future from the same cause.

Given

Given as Modified

Not Given

[66]

Plaintiffs Instruction Number

You are instructed that in determining the amount of damages to which the plaintiff may be entitled in this case, you will consider the nature, extent and severity of such injury or injuries, if any, sustained by him as the proximate result of defendant's negligence; whether such injury or injuries were temporary or of a permanent nature; the extent, degree and character of suffering, mental and phy-

sical, from such injury; the duration and severity thereof; any medical expenses incurred or likely to be incurred, including nursing care and attendance; loss of time and value thereof; and loss of present and/or future earning capacity, if any, resulting therefrom. From all of these circumstances you are to resolve what sum will fairly compensate the plaintiff for the injuries which you find that he has so sustained, not exceeding the sum of \$30,000.00.

Given

Given as Modified

Not Given

[67]

Plaintiffs Instruction Number

You are instructed that special damages as distinguished from general damages are those which are natural but not necessary consequences of a negligent act. They are damages which, as such, were incurred by the particular individual by reason of the particular circumstances. They are such as will compensate plaintiff for the reasonable value, not exceeding cost to plaintiff, of the examinations, attention, care by physicians and surgeons, reasonably required and actually given in the treatment of plaintiff, and reasonably certain to be required and to be given in his future treatment, and included in such care, X-ray pictures, the reasonable value not exceeding the cost to plaintiff of the services of nurses, attendants, hospital accommodations and ambulance service, if any, and reasonably certain to be required and given in his future treatment, if

any, and finally, the special damages are such as will compensate plaintiff for the reasonable value of the time lost, if any, by plaintiff since his injury wherein he has been unable to pursue his occupation. In determining this amount, you should consider such plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injuries, and further consider the evidence as to the probability and possibility of plaintiff pursuing his occupation or any occupation in the future.

Y

Given

Not Given

Given as Modified

[Lodged]: Feb. 16, 1950.

[Endorsed]: Filed Feb. 20, 1950. [68]

United States District Court, Southern District of
California, Central Division

No. 9134-Y Civil

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a corpora-
tion,

Defendant.

VERDICT

“We, the Jury in the above-entitled cause, find in favor of the plaintiff, William J. Byrne, and against the defendant, Woodworkers Tool Works, a corporation; and fix plaintiff’s special damages at Eight Thousand Dollars, and fix plaintiff’s general damages at One Thousand Dollars.

Dated: February 21st, 1950.

/s/ GEO F. CALDWELL,

Foreman of the Jury.

[Endorsed]: Filed February 20, 1950. [87]

United States District Court, Southern District of
California, Central Division

No. 9134-Y Civil

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a corpora-
tion,

Defendant.

JUDGMENT ON VERDICT

The above-entitled cause was tried before the Court and a duly-impanelled jury, on February 16, 17, 20, 21, 1950; and oral and documentary testimony was admitted in evidence; John W. Olson, Esq., appeared as counsel for plaintiff; and Hulen C. Callaway, Esq., and F. V. Lopardo, Esq., appeared as counsel for defendant.

On February 20, 1950, said cause was submitted to the jury; which presented its verdict February 21, 1950, after deliberation. On order of the Court, the jury was polled and each member thereof stated that the verdict as presented and read was his verdict. Whereupon, the Court ordered that said verdict be filed and entered, said verdict being as follows:

“United States District Court, Southern District,
of California, Central Division

No. 9134-Y Civil

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a corpora-
tion,

Defendant.

VERDICT

“We, the Jury in the above-entitled cause, find in favor of the plaintiff, William J. Byrne, [88] and against the defendant, Woodworkers Tool Works, a corporation; and fix plaintiff’s special damages at Eight Thousand Dollars, and fix plaintiff’s general damages at One Thousand Dollars.

“Dated: February 21st, 1950.

“GEO. F. CALDWELL,
Foreman of the Jury.”

Now, therefore, by virtue of the law and by reason of the aforesaid premises,

It Is Hereby Ordered, Adjudged and Decreed:

That the plaintiff, William J. Bryne, do have and recover of and from the defendant, Woodworkers Tool Works, a corporation, the sum of Nine Thousand Dollars (\$9,000.00), together with costs taxed at \$78.00.

Dated: Los Angeles, California, February 23,
1950.

EDMUND L. SMITH,
Clerk.

By /s/ JOHN A. CHILDRESS,
Deputy.

[Endorsed]: Filed and Entered February 23,
1950.

[See page 65]: Amended Mar. 16, 1950. [89]

[Title of Court.]

NOTICE BY CLERK OF ENTRY
OF JUDGMENT

Tripp & Callaway, Esqs.,
210 West 7th Street,
Los Angeles 14, Calif.

John W. Olson, Esq.,
639 South Spring Street,
Los Angeles 14, Calif.

Re: Byrne, v. Woodworkers Tool Works,
No. 9134-Y.

You are hereby notified that Judgment on Verdict
has been entered this day in the above-entitled case,
in Judgment Book No. 64, page 119.

Dated: Los Angeles, California, February 23,
1950.

EDMUND L. SMITH,
Clerk.

By C. A. SIMMONS,
Deputy Clerk. [90]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NON OBSTANTE
VEREDICTO OR FOR A NEW TRIAL

Comes Now the defendant, Woodworkers Tool Works, through its attorney of record and moves this Honorable Court for a judgment Non Obstante Veredicto, or in the alternative for a new trial in the above-entitled cause, for the following reasons:

1. The verdict was contrary to law in that the special damages awarded to plaintiff were in excess of those pleaded or proven.

2. The evidence was insufficient to justify the verdict of the jury in that there was no evidence of negligence on the part of this defendant.

3. It was error for the Court to:

(a) Fail to grant this defendant's motion for a judgment of nonsuit at the close of plaintiff's case;

(b) Instruct the jury that the doctrine of Res Ipsa Loquitur was applicable; [91]

4. For such other and further reasons as may be presented at the hearing on this motion.

The motion shall be heard upon the pleadings and papers, upon the minutes of the Court, and upon the Memorandum of Points and Authorities filed herewith.

Dated this 3rd day of March, 1950.

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,

Attorneys for Defendant.

To Platintiff William J. Byrne, and to John W. Olson, His Attorney:

Please take notice that the undersigned will bring the above motion on for hearing before this court at the court room of Judge Leon R. Yankwich in the United States Courthouse in the City of Los Angeles on the 13th day of March, 1950, at 10 o'clock a.m., or as soon thereafter as counsel can be heard.

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,

Attorneys for Defendant.

Memorandum of Points and Authorities in Support
of Motion

I.

The verdict was contrary to law in that the special damages awarded the plaintiff were in excess of those pleaded or proven.

Plaintiff's complaint prayed for "medical expenses when the total has been ascertained". At no time did plaintiff amend his complaint to insert therein any particular amount of medical expenses claimed by him. In fact the only evidence of medical expenses incurred by plaintiff was the testimony of the plaintiff to the effect that his doctor's expenses "were about \$400.00." There was no other proof of this figure tendered and in fact it was never proven that this amount was the reasonable value of the purported medical services rendered.

As to earnings, plaintiff testified that after leaving the Selby Company he did not go to work again until about July 1, 1949, and that he lost approximately six month's earnings. However, it was proven that plaintiff had told Dr. Boyes that he had returned to work on May 1, 1949, and not July 1st. Plaintiff's total loss of earnings was at the most \$1024.00 if we accept plaintiff's testimony that he earned \$256.00 a month or about \$64.00 a week.

In recapitulation, therefore, plaintiff's special damages could not possibly be more than \$400.00 for medical expenses and \$1024.00 for loss of earnings, or a total of \$1424.00.

II.

The evidence was insufficient to justify the verdict and there was no evidence of negligence on the part of this defendant. [93]

There is no question but that defendant conclusively proved that it made between five and seven inspections of the Champion Panel Raiser Head before it was shipped. Plaintiff in nowise introduced any evidence showing or tending to show that the defendant had the duty to do anything more than inspect the castings. Though plaintiff did introduce evidence of various tests none of them was shown to be a feasible or reasonable test in this type of case, and in fact Mr. Cheney, the plaintiff's own expert, positively testified that the only reasonable tests or inspections in this type of case were visual inspection and X-ray, and it was at this point that the Court informed the jury that the X-ray

test was so expensive that it was not reasonable in the premises. It is submitted, therefore, that there was absolutely no evidence of negligence on the part of this defendant.

III.

Since plaintiff failed to prove negligence on the part of this defendant as already shown, it was error for the Court to fail to grant this defendant's Motion for a Judgment of Nonsuit at the close of the plaintiff's case.

IV.

It was error for the Court to instruct the jury that the doctrine of *Res Ipsa Loquitur* was applicable.

In support of its instruction on *Res Ipsa Loquitur* the Court cited the following cases:

Kalash vs. Los Angeles Ladder Co. 1, Cal. (2d), 229;

Dryden vs. Continental Baking Co. 11, Cal. (2d) 33;

Honea vs. City Dairy, Inc. 22 Cal. (2) 614;

Escola vs. Coca Cola Bottling Co. 24 Cal. (2d) 453;

Sheward vs. Virtue, 20 Cal. (2) 410;

O'Rourke vs. Day & Night Water Heater Co. Ltd. 31 Cal. App. (2d) 364. [94]

An analysis of these cases shows that the Dryden and Escola cases are the only cases relying on the doctrine of *Res Ipsa Loquitur*, and the analysis further shows that these two cases are distinguishable from the case at hand, for the reason that the

Dryden case is a food case, and the Escola case is a carbonated beverage case.

It must be further noted that in the Escola case, it was definitely proven that the bottle was in exactly the same condition when handled by the plaintiff as it was when shipped by the defendant. Furthermore, it cannot be too strogly urged that the decision in the Escola case drastically extended the prevailing rule in California and was intended to apply only in cases involving containers of carbonated beverages, therefore, the rule of this case should be limited to cases wherein the facts are closely similar to the facts of this case, and should not be extended to apply to cases having dissimilar facts and not involving carbonated beverages.

The following excerpts from the Honea case cited by the Court are peculiarly applicable to the facts of the instant case and should be determinative.

“While the dairy may have had a duty to make an examination of all bottles, whether newly purchased or returned by prior customers, it is not responsible for defects that cannot be found by a reasonable, practicable inspection.”

“In the present case there is no evidence that a feasible means of discovering the defect or flaw was available to this defendant.”

“In the Bruckel case the court said (102 N. Y. S. 398): ‘There is no proof that inspection or examination of the bottle would have made its defect known to the most careful vendor or even to an expert in his employ. It does not appear that either

one or the other could have ascertained the defect by any test short [95] of those made by the expert witness of the plaintiff. If the fact were otherwise, it was the duty of the plaintiff to give evidence thereof; and in the absence of all evidence the jury cannot grope in speculation for a test or assume that there was one.' "

"The limit of its duty was to provide against defects discernible upon reasonable inspection and to handle the bottles with reasonable care. There is not anything to show it failed of its duty in these respects. We cannot conjecture that it may have done so. The mere happening of the accident did not establish negligence, and that only was shown. The proof offered by plaintiff clearly failed to support the burden imposed upon him. As was said by the learned court below: 'Under the evidence the only reasonable inference that can be deducted is that the accident was due to a latent unsuspected defect. *McSorley v. Katz*, 53 Pa. Super 243.' There being causes apparent, other than those within defendant's control, to which the accident might with equal fairness be attributed, the doctrine of *res ipsa loquitur* does not apply. *Norris vs. Philadelphia Electric Co.* 334 Pa 161 (5A 2d. 114). The direction of a verdict for defendant was necessary.'" (Underscore ours.)

Conclusion

For the above reasons it is respectfully submitted that this defendant's Motion For Judgment Non

Obstante Veredicto be granted, or in the alternative that a new trial should be ordered.

Respectfully submitted,

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 3, 1950. [96]

[Title of District Court and Cause.]

MOTION TO AMEND VERDICT

(Affidavit of Foreman of Jury Attached)

Now Comes the plaintiff William J. Byrne in the above-entitled cause by John W. Olson, his attorney, and moves this Court to amend the verdict in the above-entitled cause so that it will read as follows:

“We the Jury in the above-entitled cause find in favor of the plaintiff, William J. Byrne and against the defendant Woodworkers Tool Works, a corporation, and fix plaintiff’s special damages at \$1,000.00 and fix plaintiff’s general damages at \$8,000.00.

“Dated: February 21, 1950.

“GEORGE F. CALDWELL,

“Foreman of the Jury.” [98]

In support of this motion plaintiff attaches hereto the affidavit of George F. Caldwell, Foreman of the Jury.

“If a verdict is informal, but otherwise sufficient, in that it is responsible to all the issues the Court may enter it in proper form.”

CyClopedia of Federal Procedure 2nd Edition, Volume 8, Page 18 in Cases Cited.

“The Court may amend a verdict in respect of defects which are formal and have no connection with the merits of the cause, where the amendment in no respects changes the rights of the parties.”

24 Cal. Jurisprudence at Page 892 and Cases Cited.

/s/ JOHN W. OLSON,

Attorney for Plaintiff. [98-A]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE CALDWELL,
FOREMAN OF THE JURY

State of California,
County of Los Angeles—ss.

George Caldwell being thus duly sworn deposes and says:

That I was foreman of the Jury in the trial of the above-entitled action, which brought in a verdict for plaintiff and against the defendant for the total

sum of \$9,000.00 on February 21, 1950; that fifteen (15) minutes after said verdict was returned and the jury was discharged, I learned that an error was made in filling in the amount awarded as special damages and the amount awarded as general damages; that it was my function as foreman to perform the clerical work of filling in said respective amounts on the form of verdict supplied therefor, and to sign the verdict of the jury as its foreman; that the jury arrived at its verdict within a period of ten minutes of the time when we were to [99] again report to the Court on the progress of our deliberations and that verdict unanimously arrived at was for \$8,000.00 as general damages and \$1,000.00 as special damages. That in Proceeding to write down and sign that verdict, I learned after it return that in the haste caused by the limited time, we had to return it to the Court. I made the clerical error of writing the sum of \$8,000.00 opposite the printed words "Special Damages" and \$1,000.00 opposite the printed words "General Damages," whereas it was intended that as aforesaid that \$8,000.00 should have been written opposite the printed words "General Damages" and \$1,000.00 opposite the printed words "Special Damages" and this all Jurors will verify.

/s/ GEORGE CALDWELL,
Foreman of the Jury.

Subscribed and sworn to before me this 9th day
March 1950.

[Seal] [Indistinguishable.]

Notary Public in and for the County of Los An-
geles, State of California.

Receipt of copy attached.

Filed March 9, 1950. [100]

United States District Court, Southern District of
California, Central Division

No. 9134-Y Civil

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a corporation,
Defendant.

AMENDED JUDGMENT ON VERDICT

The above-entitled cause was tried before the Court and a duly-impanelled jury, on February 16, 17, 20, 21, 1950; and oral and documentary testimony was admitted in evidence; John W. Olson, Esq., appeared as counsel for plaintiff; and Hulen C. Callaway, Esq., and F. V. Lopardo, Esq., appeared as counsel for defendant.

On February 20, 1950, said cause was submitted to the jury; which presented its verdict February

21, 1950, after deliberation. On order of the Court, the jury was polled and each member thereof stated that the verdict as presented and read was his verdict. Whereupon, the Court ordered that said verdict be filed and entered, said verdict being as follows:

“United States District Court, Southern District of
California, Central Division [103]

“No. 9134-Y Civil

“WILLIAM J. BYRNE,

“Plaintiff,

“vs.

“WOODWORKERS TOOL WORKS, a corporation,
tion,

“Defendant.

“VERDICT

“We, the Jury in the above-entitled cause, find in favor of the plaintiff, William J. Byrne, and against the defendant, Woodworkers Tool Works, a corporation; and fix plaintiff’s special damages at Eight Thousand Dollars, and fix plaintiff’s general damages at One Thousand Dollars.

“Dated: February 21st, 1950.

“GEO. F. CALDWELL,
Foreman of the Jury.”

On motion of plaintiff and after hearing held on March 13, 1950, it appeared to the Court that upon the face of the verdict and upon the affidavit of the

foreman of the jury filed herein that clerical error was made in said verdict in that said foreman inserted the sum of Eight Thousand Dollars (\$8,000) after special damages, instead of One Thousand Dollars (\$1,000) after special damages; and inserted the sum of One Thousand Dollars (\$1,000) after General Damages instead of Eight Thousand Dollars (\$8,000). It is hereby ordered that said verdict is hereby amended to show the sum of One Thousand Dollars (\$1,000) as special damages and Eight Thousand Dollars (\$8,000) as general damages.

Now, therefore, by virtue of the law and by reason of the aforesaid premises,

It Is Hereby Ordered, Adjudged and Decreed:

That the plaintiff, William J. Byrne, do have and recover of and from the defendant, Woodworkers Tool Works, a corporation, the sum of Nine Thousand Dollars (\$9,000.00), together [104] with costs taxed at \$78.00.

Dated: Los Angeles, California, March 16, 1950.

/s/ LEON R. YANKWICH,
Judge.

Approved as to form:

TRIPP & CALLAWAY,
Attorneys for Defendant.

Receipt of Copy attached.

[Endorsed]: Filed and entered March 16, 1950. [105]

[Title of Court.]

NOTICE BY CLERK OF ENTRY OF
JUDGMENT

Tripp & Callaway,
210 West 7th St.,
Los Angeles 14, Calif.

John W. Olson,
639 South Spring St.,
Los Angeles 14, Calif.

Re: Byrne, v. Woodworkers Tool Works, No.
9134-Y.

You are hereby notified that Amended Judgment
on Verdict has been entered this day in the above-
entitled case, in Judgment Book No. 64, page 474.

Dated: Los Angeles, California, March 16, 1950.

EDMUND L. SMITH,
Clerk,

By C. A. SIMMONS,
Deputy Clerk. [107]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, the defendant Woodworkers Tool Works, a corporation, has filed, or is about to file, a notice of appeal to the United States Court of Appeals for the Ninth Circuit to reverse or modify the judgment entered by the District Court of United States for the Southern District of California in the above-entitled cause on February 23, 1950, and the amended judgment on verdict entered March 16, 1950, and to supersede said judgment and amended judgment; and

Whereas, the said defendant is required to give an undertaking, under seal, in the sum of \$9,963.46, conditioned for the satisfaction of the judgment or the amended judgment in full with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment or amended judgment are affirmed, and to satisfy in full any modification of the judgment or amended judgment and such costs, interest, and damages as the appellate court may adjudge and award. [108]

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Globe Indemnity Company, a corporation organized and existing under the laws of the State of New York, and duly licensed to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellant that said Appellant will comply with the conditions as above

set forth, and does further agree that, upon default by the said Appellant in any of the conditions hereof, the damages and costs, not exceeding the sum aforesaid, may be ascertained in such manner as this court shall direct; that this court may give judgment hereon in favor of any person thereby aggrieved against it for the damages and costs suffered or sustained by such aggrieved party, and that said judgment may be rendered in the above-entitled cause or proceeding against it.

In Witness Whereof, the said Globe Indemnity Company, has caused these presents to be executed and its official seal attached by its duly authorized attorney-in-fact at Los Angeles, California, this 22nd day of March, 1950.

GLOBE INDEMNITY
COMPANY,

[Seal] By /s/ R. N. OTTENSON,
Attorney-in-Fact.

The premium charged for this bond is \$199.27 per annum.

State of California,
County of Los Angeles—ss.

On this 22nd day of March in the year 1950, before me, L. Hollingshead, a Notary Public in and for the County and State aforesaid, personally appeared R. N. Ottenson known to me to be the person whose name is subscribed to the within instrument and known to me to be the Attorney-in-Fact

of Globe Indemnity Company and acknowledged to me that he subscribed the name of the said Company thereto as principal, and his own name as Attorney-in-Fact.

/s/ L. HOLLINGSHEAD,

Notary Public in and for Said
County and State.

My Commission expires May 14, 1952.

Examined and recommended for approval as provided in Rule 8.

/s/ JOHN W. OLSON,

Attorney.

I hereby approve the foregoing.

Dated this 23rd day of March, 1950.

/s/ LEON R. YANKWICH,

Judge.

[Endorsed]: Filed March 23, 1950. [110]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Woodworkers Tool Works, a corporation, hereby appeals to the Court of Appeals for the Ninth Circuit from:

1. The order entered March 21, 1949, denying this defendant's motion to dismiss the action, or in lieu thereof to quash the return of service of summons;

2. The Final Judgment on Verdict entered on February 23, 1950, in Judgment Book No. 64, page 119;

3. The Amended Final Judgment on Verdict entered on March 16, 1950, in Judgment Book No. 64, page 474.

Dated: April 10, 1950.

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 10, 1950. [111]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes Now the appellant, Woodworkers Tool Works, a corporation and designates for inclusion the complete record and all the proceedings and evidence in the above-entitled action including:

1. Summons and Amended Complaint for Personal Injuries;
2. Notice of Motion to Dismiss Action and Quash the Return of Service of Summons;
3. Affidavit of E. H. Preuer dated February 25, 1949, in Support of Motion to Dismiss Action and Quash the Return of Service of Summons;
4. Affidavit of Robert E. Dunne dated February 25, 1949, in Support of Motion to Dismiss Action and Quash the Return of Service and Summons;
5. Affidavit of William R. Walker dated March 15, 1949;
6. Affidavit of Ray Taylor dated March 15, 1949, and [113] attached invoice;
7. Second Amended Complaint for Personal Injuries (verified April 4, 1949); and Summons;
8. Ruling on Defendant's Motion to Dismiss Action and Quash Return of Service and Summons (Minute Order of March 21, 1949);
9. Motion to Dismiss First Count or Cause of Action of the Second Amended Complaint and for a more Definite Statement, (verified April 30, 1949);
10. Notice of Motion to Dismiss First Count or Cause of Action of the Second Amended Complaint

and for a more Definite Statement (dated April 30, 1949);

11. The Court's Decision on Defendant's Motion to Dismiss First Count or Cause of Action of the Second Amended Complaint and for a more Definite Statement;

12. Stipulation to Take Deposition of Witness;

13. Defendant's Requested Jury Instructions;

14. Plaintiff's Requested Jury Instructions;

15. Verdict of The Jury;

16. Judgment on Verdict;

17. Notice of Clerk of Entry of Judgment on February 23, 1950;

18. Motion by Plaintiff To Amend Verdict (dated February 21, 1950);

19. Affidavit of Foreman of the Jury in Support of Motion to Amend Verdict (dated March 9, 1950);

20. Motion by Defendant for Judgment Non Obstante Veredicto or for a New Trial (dated March 3, 1950);

21. The Court's Ruling on Defendant's Motion for New Trial;

22. The Court's Ruling on Plaintiff's Motion to Amend Verdict; [114]

23. Amended Verdict;

24. Amended Judgment on Verdict;

25. Notice of Entry of Amended Judgment on Verdict on March 16, 1950;

26. All Stenographic Transcripts of the following proceedings:

(a) Hearing on Defendant's Motion to Dismiss Action and Quash the Return of Service and Summons;

(b) Trial of the Cause and all proceedings in connection therewith;

(c) Hearing on Defendant's Motion for New Trial and on Plaintiff's Motion to Amend Verdict;

27. Defendant's Supersedeas Bond (dated March 23, 1950);

28. Notice of Appeal (dated April 10, 1950);

29. Designation of Record on Appeal;

30. Any Designation of Additional Matter filed by Appellee.

Dated this 21st day of April, 1950.

Respectfully submitted,

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 21, 1950. [115]

In the United States District Court, Southern
District of California, Central Division

No. 9134-Y

Honorable Leon R. Yankwich, Judge Presiding

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a corpora-
tion,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

JOHN W. OLSON, Esq.,

639 South Spring Street, Room 904,
Los Angeles, California.

For the Defendant:

TRIPP & CALLAWAY, by

HULEN C. CALLAWAY, Esq., and

FIORENZO V. LOPARDO, Esq.

935 Van Nuys Building,

210 West 7th Street,

Los Angeles, California. [11*]

* Page numbering appearing at top of page of original
Reporter's Transcript.

Thursday, February 16, 1950

(A jury was duly empaneled.)

(Opening statement on behalf of the plaintiff.)

(Opening statement on behalf of the defendant.)

The Court: Ladies and gentlemen of the jury, we will take a short recess at this time.

The court admonishes you not to converse among yourselves or with anyone else on any subject connected with the trial or to form or express an opinion thereon until the cause is finally submitted to you.

(Short recess taken.)

The Court: Let the record show the jury is in the box. Proceed. Call your first witness.

Mr. Olson: Mr. George Selby.

GEORGE SELBY

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: George Selby.

Direct Examination

By Mr. Olson:

Q. Mr. Sleby, in answering my questions and the questions Mr. Callaway puts to you, raise your

(Testimony of George Selby.)

voice, will you, [12] so that the jury can hear you.

A. Yes, sir.

Q. What is your business or occupation, Mr. Selby?

A. We are manufacturers of sash and doors.

Q. Do you own the business? A. I do.

Q. Did you own the business in the month of October of 1946? A. Yes, sir.

Q. Where is that business located?

A. In Burbank.

Q. Can you give us the address?

A. 1101 West Victory Boulevard.

Q. Did you in the month of October and prior thereto have in your employ a man by the name of William J. Byrne? A. Yes, sir.

Q. Do you know when he was first employed by you?

A. I don't recall offhand. I could determine that from my records.

Q. Can you give us an approximation?

A. As I remember, about 30 days prior to the time he was injured.

Q. Do you know in what capacity Mr. Byrne was employed?

A. He was operating a shaper.

Q. You are getting a little ahead of me. In other words, [13] when Mr. Byrne was hired, what was he hired for?

A. As I recall, the union contract classifies each type of man in the mill as a certain type of oper-

(Testimony of George Selby.)

ator. Mr. Byrne was hired to operate a shaper.

Q. I see. Do you know what Mr. Byrne's wages were on or about October 28, 1948?

A. I made notes on that, if I may refer to them.

Q. You personally made those notes?

A. Yes.

Q. You may refresh your memory. I might ask you, for the record, from what source were those notes made?

A. They were taken from our employment records in our office.

Q. When did you make your notes?

A. Yesterday.

Q. Will you tell what they disclose?

A. Yes. He was hired—the technical term is a joiner, and the rate is \$1.60½ per hour.

Q. He was making \$1.60½ per hour?

A. Yes.

Q. Do you have a record of how much he worked, how many hours per day he worked?

A. The regular work day is eight hours.

Q. What are the hours?

A. At that time, I believe, we commenced at 8:00 o'clock [14] in the morning and took a half hour at noon, and closed at 4:30.

Q. Then Mr. Byrne would work eight hours a day, approximately? A. That is correct.

Q. To your knowledge was he working steadily up to the time of the accident, after he was hired?

A. He was.

(Testimony of George Selby.)

Q. How many days a week did you work?

A. Five days was the normal work week.

Q. Did you have any weeks where your work week consisted of more than five days?

A. There were times when we worked on Saturday mornings, which was overtime.

Q. I see. Did you on or before October 28, 1948, purchase what we designate as a panel raiser head from the Woodworkers Tool Works?

Mr. Callaway: Just a moment. I object to that as leading and suggestive.

The Court: Read the question.

(The question was read.)

The Court: Overruled.

Q. (By Mr. Olson): Answer the question.

A. We did get—we did buy a panel raiser head from the firm in Chicago that you describe. [15]

Q. Was it delivered to you from the firm in Chicago, the Woodworkers Tool Works?

A. Yes, sir.

Q. Do you know what date it was delivered to you?

A. It was delivered to us on the 25th of October, in 1948.

Q. Do you have any record of how it was delivered to you? That is, was it by train, automobile, personal messenger?

A. It was delivered by air express.

Q. Direct from the Woodworkers Tool Works to you?

A. Yes, sir.

(Testimony of George Selby.)

The Court: Could you give us the date?

The Witness: Yes.

Mr. Olson: Yes. October 23, 1948.

The Witness: No. October 25th.

Mr. Olson: 25th. Excuse me.

Q. (By Mr. Olson): Did you give us the time that it was delivered to you? A. No, sir.

Q. Did you see the panel raiser head when it was delivered or the container, or if it was in a container, the container in which it was deposited when it was delivered? A. No, sir.

Q. Who ordered this panel head? [16]

A. Mr. Walker, our plant superintendent.

Q. Do you know, to your own personal knowledge, what was done with the panel raiser head when it was delivered to you by the Woodworkers Tool Works? That question can be answered yes or no. A. No, sir.

Q. When you have machine tools delivered to you, where are they usually placed, in whose custody are they usually given?

A. Any equipment of that kind that would be delivered to us would be sent immediately to the tool crib.

Q. Do you know who is in charge of the tool crib?

A. A man by the name of Chirby was in charge at that time.

Q. Is he in charge at the present time?

A. Yes, he is.

(Testimony of George Selby.)

Q. Do you employ Mr. Chirby?

A. No, sir.

Q. Who does?

A. Our landlord, General Panel Corporation.

Q. Do you have an arrangement with the General Panel Corporation whereby you use Mr. Chirby's tool shed and his services?

A. Our lease with General Panel requires that they have complete supervision of all machines. And Mr. Chirby—— [17]

Q. That you use?

A. Yes, sir; whether they are our machines or their machines.

Q. Do you know, of your own personal knowledge, what Mr. Chirby's job is with General Panel?

A. He is in charge of maintaining, servicing and installing all their equipment.

Q. Does he install all of your equipment?

A. Yes, sir.

Q. Does anybody else install equipment for you?

A. Only under his direction.

Q. Are you aware of the fact that there was an accident occurred on or near your plant on October 28, 1948?

A. Are you referring to the accident in which Mr. Byrne was hurt?

Q. Yes. Are you aware it happened?

A. I was aware of it a few minutes after it happened, yes, sir.

Q. How were you apprised of the fact an accident had occurred?

(Testimony of George Selby.)

A. I don't recall who told me, but someone told me orally he had been hurt.

Q. Upon your being told that Mr. Byrne had been hurt, what did you do? Did you go to the scene of the accident?

A. I did, about 30 minutes later. The first thing we [18] did was see to it that he got to a doctor immediately.

Q. Did you see to it?

A. I ordered—I instructed my brother to see to it, and he took care of it.

Q. Who is your brother? What is his name?

A. His name is James Selby.

Q. What is his job, if any, in your company?

A. He is the manager of the company.

Q. To your knowledge did your brother James Selby take Mr. Byrne to a doctor immediately?

A. I don't know that he took him. He was taken to a doctor.

Q. Do you know who took him?

A. No, sir.

Q. Did you ever see the panel raiser head after the accident? A. Yes.

Q. Where did you see it?

A. I instructed Mr. Walker to bring it to me immediately.

Q. Who is Mr. Walker?

A. Our plant superintendent.

Q. Is he working with you now?

A. No, sir.

(Testimony of George Selby.)

Q. Did Mr. Walker bring it to you immediately?

A. Yes. [19]

Q. Did he bring it to you in one piece?

A. There were two pieces.

Q. What, if anything, did you do with the part after it was brought to you?

A. I put it in our safe.

Q. Personally? A. Yes, sir.

Q. Both pieces? A. Both pieces.

Q. How long did it remain in your safe?

A. Probably for several months. I don't recall for sure.

Q. When was it first taken out of your safe, if at all?

A. It was taken out at the request of a gentleman who represented the insurance company that carried the liability insurance for the tool company in Chicago, from whom we purchased the head.

Q. Did you give them the head?

A. Yes, sir.

Q. How long did they keep it, to your knowledge? A. As I remember, about a week.

Q. It was then returned to you?

A. Yes.

Q. What did you do with it?

A. I put it back in the safe where I kept it before. [20]

Q. Were two pieces returned to you?

A. Yes, sir.

Q. Was it ever let out of your safe after that?

(Testimony of George Selby.)

A. Yes, sir.

Q. Explain the circumstances of that happening.

A. It was given to you when you asked for it.

That was the only other time.

Q. Have you seen it since? A. Yes, sir.

Q. When? A. I saw it yesterday.

Q. But that is the first time you have seen it since the time you first gave it to me some months ago? A. Yes, sir.

Q. Let me ask you this, Mr. Selby: Do I understand your testimony to be that from the time immediately after the accident or soon thereafter the part was brought to you directly? A. Yes, sir.

Q. And that you placed it in a safe?

A. Yes.

Q. And that nobody else has seen or had possession of that part with the exception of one agent of an insurance company you mentioned and myself, to your knowledge? A. That is correct. [21]

Q. You testified you saw the part after the accident? A. Yes, sir.

Q. You examined it? A. Yes, sir.

Q. Do you know, to your personal knowledge, what wood Mr Byrne was working with at the time of the accident? A. Yes, sir.

Q. How do you happen to know that?

A. We only use one type of wood in our manufacturing.

Q. What were you manufacturing at that time?

A. We only used one type of wood in our manufacturing.

(Testimony of George Selby.)

Q. What were you manufacturing at that time?

A. Doors and windows.

Q. Do you know what Mr. Byrne was working on at the time of the accident?

A. Yes, sir, he was raising panels for the manufacture of doors.

Q. Can you describe to the jury and the court as simply as possible what you mean by raising panels?

A. Well, the term "raising" means to bevel the edges on a panel of wood that goes into the door. It is beveled on all four sides.

Q. I don't recall whether you answered this question before or not: What kind of wood was Mr. Byrne working on at the time of the accident? [22]

A. White pine.

Q. Is that wood soft or hard?

A. It is very soft.

Q. What was to be its purpose?

A. I don't understand the question.

Q. It was being made into a door, did I understand you to say?

A. It was being made into a panel to put into a door.

Q. Do you have a sample of that exact wood that was being used by Mr. Byrne at the time of the accident? A. Yes.

Q. How do you happen to have it?

A. We have a lot of samples.

Q. I am trying to establish how you know that

(Testimony of George Selby.)

the sample you have is of the same lot as the wood, exact wood Mr. Byrne was using at the time of the accident?

A. That particular lot of panels that we were running was for a carved door we sold in the east. They were of a particular style, and that is the only one we sold.

Q. You had some left over?

A. We always make an overrun of from 5 to 12 per cent. We still have all the overrun we had at that time.

Q. You know definitely, of your own personal knowledge, you have a piece of that wood, and that that is the wood from the same exact lot Mr. Byrne was working on at the time of the [23] accident in 1948?

A. Yes, sir.

Q. I will ask you, Mr. Selby, if this is the type of wood and the shape of wood Mr. Byrne was working on at the time of the accident?

A. It is.

Q. And it is soft pine?

A. Yes, sir.

Q. So that the jury may understand, will you describe what Mr. Byrne was doing—is this the finished piece of wood (indicating)?

A. Yes.

Q. In other words, Mr. Byrne was doing to wood what this has had done to it?

A. That is right.

Q. Will you describe what that is to the jury?

A. This is one of four panels, two long ones

(Testimony of George Selby.)

and two shorter ones; be about half the length of this that go into the door.

The outer portion is called the stiles and the top and bottom are called the rails. These are the panels that go into a raised panel door. The reason we call it raised is the edges have been beveled on all four sides.

Q. What bevels them?

A. The panel raiser head. [24]

Q. Could you explain as simply as possible how that is done? In other words, is it beveled on both sides?

A. Yes, sir. It is beveled on both sides. That is the reason we bought the head. Without the head we would have to bevel just one side at a time. With the head, with the panel raiser head that broke—it was made in two pieces or two sections, and it would bevel both sides at the same time and cut our labor costs in two.

Q. If I don't interpret you correctly, you tell me. As I understand it, this piece of wood, lumber, is placed on a table and run through the cutter and the cutter cuts this, and this at the same time (indicating)?

A. Both sides at the same time.

Q. Could you tell us what cut that is, what size cut? Would you consider that a large or small cut?

A. That is a question I wouldn't—

Q. You are not qualified?

A. It is just an ordinary cut.

(Testimony of George Selby.)

Q. Did you ever pay for the panel raiser head in question here?

A. I don't think so. I am sure we didn't.

Mr. Olson: I would like at this time to offer this piece of wood in evidence.

The Court: It may be received.

Mr. Olson: I would like the jury to look at it. [25]

The Court: The jury can examine it when you are through with the witness. They can look at it from where it is.

The Clerk: Plaintiff's Exhibit 1 in evidence.

(The article referred to was marked Plaintiff's Exhibit 1, and was received in evidence.)

Q. (By Mr. Olson): Where was this wood purchased, Mr. Selby?

A. I don't know; we bought wood from a good many different firms.

Q. You are unable to tell at this time exactly where this particular piece of wood was purchased?

A. Even then I couldn't have told.

Q. I see. A. I don't know.

Mr. Olson: Your Honor, I have a few more questions to ask this witness but I didn't know we would move this quickly. Br. Byrne is getting something for me. Mr. Callaway will stipulate I can take Mr. Selby back on direct, after he is through with cross-examination.

The Court: All right.

(Testimony of George Selby.)

Cross-Examination

By Mr. Callaway:

Q. Mr. Selby, do you know Mr. Townsend who sits here in the court room (indicating)?

A. Yes, sir. [26]

Q. He is with the Woodworkers Supply Company of Los Angeles, is that not true?

A. Yes, sir.

Q. He is the man from whom you purchased the raiser head in question?

Mr. Olson: I object to that question as being immaterial. It has nothing to do with the case.

The Court: It is preliminary to something, I don't know what.

You may answer.

The Witness: We didn't purchase it from any man. We purchased it——

Q. (By Mr. Callaway): You called him and gave the order for it, didn't you?

A. I didn't myself, no, sir.

Q. Who in your organization actually placed the order?

A. I imagine my brother placed the order. We file purchase orders for everything we buy.

Q. Do you have that purchase order?

A. No, sir.

Q. Is it available to you?

A. It would be in our records, yes, sir.

Q. Would you have an opportunity to get it over the noon hour?

(Testimony of George Selby.)

Mr. Olson: I object to these questions on the ground [27] they are all immaterial.

The Court: I do not see the materiality of the purchase order at the present time.

Mr. Callaway: I will proceed to develop it.

Q. (By Mr. Callaway): You got a bill from the Woodworkers Supply Company of Los Angeles for this raiser head, did you not?

Mr. Olson: Same objection.

The Court: Overruled. Go ahead.

The Witness: Yes, sir.

Q. (By Mr. Callaway:) And you didn't get any bill from the Woodworkers Tool Works of Chicago?

Mr. Olson: Same objection.

The Court: I will allow that.

Mr. Olson: Your Honor, may I point out that this is nothing but an attempt to bring up an issue that has already been settled by this court, bringing up a jurisdictional question.

The Court: That is all right. The relationship between the parties may be shown. The legal effect will be determined by the court.

Mr. Callaway: Certainly.

Mr. Olson: The legal effect has already been determined by the court and a record made.

The Court: There is no harm in showing the purchase was [28] not direct from the defendant. I will instruct the jury as to the theory of liability.

Mr. Olson: I don't want to maintain this argu-

(Testimony of George Selby.)

ment, your Honor, but the purpose of this is not for the purpose of defending this suit. The purpose is for reopening the question of jurisdiction, for the purpose of an appeal if necessary. I say the record has been made.

The Court: I can guess objects as fast as you can.

Mr. Olson: Yes, your Honor.

The Court: If I discern any attempt to becloud the issue, I will stop counsel before you even object.

Mr. Olson: I understand that. I don't want any question of jurisdiction in this trial. The record has been made.

The Court: There is no question of jurisdiction being raised at the present time. The mere fact that other parties are not before the court does not change the jurisdiction of this court.

Mr. Callaway: I understand that.

The Court: No demand has been made that anybody be joined, which would destroy jurisdiction. If demand were made under the Code, if the bringing in of a new party would affect the court's jurisdiction, I have a right to deny it. Let us go on.

Mr. Callaway: May the question be head?

(The question was read.) [29]

The Witness: We got a manifest from the tool company in Chicago.

Q. (By Mr. Callaway): I didn't ask you that. I asked if you got a bill.

(Testimony of George Selby.)

A. What do you mean by "bill," sir?

Q. A bill billing you for this particular raiser head.

A. We did not.

Q. By manifest do you mean a shipping document?

A. Yes, sir.

Q. Now, what is the difference between a shaper and a joiner?

A. I don't know, sir.

Q. Well, is there any?

A. I don't know that there is.

Q. All right. Was this the only raiser head that you had in your plant of this type, where it could cut both edges at the same time?

A. Yes, sir.

Q. Do you know who installed it, of your own personal knowledge?

A. I didn't hear that.

Q. Do you know who installed this particular raiser head, of your own personal knowledge?

A. I know who I was told installed it. I didn't see them. [30]

Q. If you don't know, all right. Did you ever see it in operation before Mr. Byrne's accident?

A. No, sir.

The Court: Was your answer that you did not see it installed?

The Witness: No, sir, I did not.

The Court: Who installed it?

The Witness: Mr. Chirby, the gentleman who was in charge of servicing all the equipment for our landlord. He installed it.

The Court: For your landlord?

The Witness: Yes, sir.

(Testimony of George Selby.)

The Court: It was no one connected with the defedant, the Woodworkers Tool Works?

The Witness: No, sir.

Mr. Callaway: I think that is all.

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Selby, you testified that you saw the part immediately after the accident, is that ocrrect?

A. Yes, sir.

Q. You did not see this part before it broke, is that correct (indicating)? A. No, sir.

Q. You said the part was in two parts when you saw it? [31] A. Yes.

Q. Am I correct, then, Mr. Selby, that you did not see this part——

A. When I said two parts, I meant that I saw this part and the part that had broken off.

Q. Had this part broken off, too?

A. I can tell.

Q. It is broken off here (indicating).

A. Yes. These are the parts.

Q. There are two parts and the main head, is that correct? That is, when you saw it?

A. There are two sections, yes.

Q. In other words, let me put it this way: When the part was brought to you immediately after the accident, is that substantially what it looked like?

A. Yes, sir.

(Testimony of George Selby.)

Q. That is what you put into your safe?

A. That is correct.

Mr. Olson: I want to offer this as Plaintiff's next in order. However, I do that with an explanation. There are two detachable parts from this main head, both of which the plaintiff will prove were broken off when the part disintegrated. However, we must explain these two parts which, if you are mechanical enough, you can put together and they will fit on to the actual breaking off of the safety and from which [32] cuts were made by experts who tested this metal. These two smaller parts were still somewhere, which the expert will testify to. He had to cut these two to make the analysis.

I will offer the four parts and the panel raiser head in evidence as Plaintiff's next in order.

The Court: They may be received.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(The articles referred to were marked Plaintiff's Exhibit 2, and were recieved in evidence.)

Q. (By Mr. Olson): While you are on the stand and so the jury may have a clear conception of this, is it my understanding—of course, this part is broken and we can't make an exact demonstration—but generally speaking, these are the cutters and the wood goes in between the cutters and makes those grooves you testified to, is that correct (indicating)?

(Testimony of George Selby.)

A. It makes a beveled edge.

Q. It is placed upon your—what is the name of that panel——

A. Joiner.

Mr. Byrne: Joiner.

Mr. Olson: What is the spindle on?

Mr. Byrne: A machine.

The Court: What is the name of the machine?

Mr. Bryne: Oliver joiner. [33]

Mr. Olson: Shaper, I understand. It is the same thing. This is put on the shaper and it rotates, and the wood is put in between it to bevel the sides.

Q. (By Mr. Olson): I might ask you this: Was this tag on that part when it was brought to you, to your knowledge (indicating)?

A. I don't remember.

Mr. Olson: So that the jury won't be confused, Mr. Callaway, can we agree a shaper and a joiner are the same thing?

Mr. Callaway: I don't know. That is what I am trying to find out.

Mr. Olson: I will have to find out.

Q. (By Mr. Olson: Do I understand you now that when the part was brought to you this was off (indicating)? These two pieces, we understand, they were still there (indicating). This was off, is that correct (indicating)?

A. Yes, sir.

Q. Now, I ask you if this then was substantially the shape you found it in when it was first delivered to you? I think your attention should be called to this fact: Were these drill holes in it (indicating)?

(Testimony of George Selby.)

A. No, sir.

Q. In other words, your testimony now is that is in substantially the same form, but these two holes on the lower [34] arm and the three holes on the upper arm were not there?

A. They were not.

Q. Was this hole in there (indicating)?

A. I don't remember.

Q. You don't remember? A. No, sir.

Mr. Olson: I offer these as Plaintiff's Exhibits 2, 2-A, -B and -C, and -D.

The Court: They may be received.

The Clerk: Plaintiff's Exhibits 2, 2-A, 2-B, 2-C and 2-D in evidence.

(The articles referred to were marked Plaintiff's Exhibits 2, 2-A, 2-B, 2-C and 2-D, and were received in evidence.)

Q. (By Mr. Olson): Did Mr. Byrne continue to work for you after the accident?

A. No, sir.

Q. How long was he away from your plant?

A. After the accident?

Q. Yes.

A. He never came back to work for us.

Q. Didn't he come back at one time for a short period of time?

A. I don't recall, if he did. He may have.

Mr. Olson: I think that is all. [35]

Mr. Callaway: I have no questions.

The Court: All right. Step down.

(Witness excused.)

Mr. Olson: Again, I am in trouble, your Honor. I didn't know we would move this fast with the jury.

The Court: You should learn that.

Mr. Olson: I haven't been before your Honor before in this kind of cases. My next in proof is not here. What time would you convene after the lunch hour?

The Court: 1:30.

Mr. Olson: He will be here at 1:30, but he is not here now.

The Court: All right. Ladies and gentlemen of the jury, we are about to take an adjournment to 1:30.

The court admonishes you not to converse among yourselves or with anyone else on any subject connected with the trial, or form or express an opinion thereon until the cause is finally submitted to you.

When you return, go to the jury room, and you will be called. I do not want you to stand in the hallways. There may be people connected with the case in the hallways talking, and you are not supposed to overhear any of the conversations about the case.

(Thereupon, at 12:10 o'clock p.m. a recess was taken until 1:30 o'clock p.m. of the same day.) [36]

Los Angeles, California, Thursday, February
16, 1950, 1:40 P.M.

The Court: Let the record show the jury is in the box.

Mr. Olson: I ask leave to recall Mr. George Selby to the stand for two more questions if that is all right.

The Court: All right.

GEORGE SELBY

recalled as a witness on behalf of the plaintiff, having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Olson:

Q. Mr. Selby, since you were on the stand this morning, have you had occasion to check the records of your office regarding Mr. Byrne's employment?

A. I called my office and had them read the information on the employment record.

Q. Who read it?

A. The girl by the name of Mary Bailey, who is in charge of our employment files.

Q. Did you talk to anyone else besides Miss Bailey? A. No, sir.

Q. You didn't talk to your brother?

A. Not about the files.

Q. Did you make notes from what information was given [37] you by Miss Bailey?

A. Yes, sir.

(Testimony of George Selby.)

Q. That information was read to you over the phone by Miss Bailey, from your office records?

A. That is correct.

Q. Does your information, after you have made this investigation, show that Mr. Byrne was re-employed by your company after the accident?

A. Yes, sir.

Q. Your records show when he was reemployed?

A. Yes, sir. On the 10th of January, 1949.

Q. Do they show how long he worked after the 10th of January, 1949?

A. Yes, sir. Until the 1st of February, 1949.

Q. Do they show then that he no longer worked for you? A. That is correct.

Q. Does your record show whether he quit or was discharged or laid off, or what happened?

A. The record shows his employment was terminated because of unsatisfactory service.

Q. What do you mean by "unsatisfactory service" on those records?

Mr. Callaway: The record will speak for itself, if the court please.

The Court: Overruled. Go ahead. [38]

Q. (By Mr. Olson): Answer the question.

A. The term "unsatisfactory service" in this case means that he was not able to perform his work satisfactorily, in compliance with our standards.

Q. Do your records have any indication, or do you know, of your own personal knowledge, whether Mr. Byrne's work was satisfactory before the accident? A. It was satisfactory, yes, sir.

(Testimony of George Selby.)

Q. One more question or two. I neglected to ask you, Mr. Selby, when I showed you Plaintiff's Exhibit 2, being the panel raiser head, whether at the time you saw that raiser head after the accident you observed the hole in the upper cut or the one that broke. A. I did observe it, yes, sir.

Q. Was that hole or blow-hole or void which you see here (indicating) exactly the same hole or void or blow-hole you saw immediately after the accident in this device? A. Yes, sir.

Q. Same size, shape and depth? A. Yes.

Q. To the best of your knowledge?

A. Yes.

Q. Then again the only difference in this panel raiser head, as you see it now, as distinguished from when you saw it immediately after the accident, is the holes drilled in the [39] upper and the lower arms for analysis?

A. The only hole I saw is the bubble in there now.

Cross-Examination

By Mr. Callaway:

Q. Mr. Selby, on Mr. Byrne's return to work for you in January, he returned to work as a helper, did he not?

A. His rate was the same, and I imagine that his classification was the same as it had been before.

Q. Well, he returned to work there as a helper?

A. Well, all I can tell you, sir, is that the rate was the same.

(Testimony of George Selby.)

Q. You don't know whether his work was satisfactory or unsatisfactory, of your own personal knowledge, do you?

A. No, sir. I only stated what was shown on our employment records.

Mr. Callaway: Well, I move to strike out the witness' testimony as being hearsay on the subject of whether or not the plaintiff's work, when he returned in January of 1949, was satisfactory or unsatisfactory.

The Court: You are not called upon to express any judgment yourself; you are merely going by what your employment cards would show?

The Witness: By what the records show, that is correct.

The Court: You did not make the notation, did you? [40]

The Witness: No, sir.

The Court: The motion will be granted. The jury is instructed to disregard the statement that the plaintiff's work was unsatisfactory.

Q. (By Mr. Callaway): During the period of, I believe, one month, when Mr. Byrne had worked there before he had his accident, he was employed as a joiner?

A. Yes, sir.

Mr. Callaway: That is all.

Mr. Olson: That is all.

The Court: All right. Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Olson: May this witness be excused, Mr. Callaway?

Mr. Callaway: So far as I am concerned.

Mr. Olson: I will call Mr. Chirby to the stand.

MICHAEL L. CHIRBY,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Michael L. Chirby.

Direct-Examination

By Mr. Olson:

Q. Mr. Chirby, will you keep your voice up? It is hard [41] to hear in here and we want the jury and the court and everyone to hear you.

A. Yes, sir.

Q. Please keep that in mind.

A. Yes, sir.

Q. Mr. Chirby, what is your occupation?

A. My occupation there at this time is knife grinder and saw filer at General Panel Corporation.

Q. Were you employed by General Panel Corporation in October of 1948? A. Yes, sir.

Q. In what capacity. A. Same capacity.

Q. Among your duties, was it your duty to install cutting devices upon machines?

A. Yes, sir.

(Testimony of Michael L. Chirby.)

Q. Did you install cutting devices for the Selby Company as well as for the company for which you were working? A. Yes, sir.

Q. To your knowledge did anyone in October of 1948 install cutting devices for Selby Company, other than yourself?

A. No, sir, not to my knowledge.

Q. In other words, I understand your testimony to be that it was your exclusive duty to install any cutters for the Selby Company that might be purchased or used? [42] A. That was my job.

Q. What experience have you had in installing cutters upon machines, wood-cutting machines?

A. Well, I have had——

Mr. Callaway: Just a moment. I object to that as being immaterial, unless it is confined to this particular type.

Mr. Olson: All right. Strike that.

Q. (By Mr. Olson): Have you had occasion to install cutter heads on shapers before October of 1948? A. Yes.

Mr. Callaway: I object to that, unless it is confined to this particular type.

The Court: This is merely a general examination, to show familiarity. Overruled.

The Witness: Yes.

Q. (By Mr. Olson): Yes, you have?

A. Yes.

Q. What experience have you had in installing cutting devices upon instruments used to turn them?

(Testimony of Michael L. Chirby.)

A. Well, I grind knives, I install them, set-up man since 1929, off and on, when I could get that kind of work.

Q. Did you have occasion to install a device referred to or known as a panel raiser head for the Selby Company on or about October 25th or 26th, 1948? A. I remember that head, yes. [43]

Q. Did you install it? A. Yes, I did.

Q. When were you first given possession of that head?

A. Well, immediately after it come from Chicago.

Q. Did it come in a container? A. Yes.

Q. What kind of a container?

A. Cardboard box.

Q. Was it sealed? A. Yes.

Q. It was handed to you by whom, do you remember? A. I do. I do remember.

Q. Who was it?

A. It was the superintendent at Selby's at the time.

Q. Do you know his name?

A. Well, his name is Cornelius Leewenkamp.

Q. He gave you the sealed container and handed it to you, is that correct? A. That is right.

Q. What did you do with it?

A. I broke the seal, opened the box.

Q. Did you take it anywhere? Where did you break the seal?

A. In my shop, in my workshop there.

(Testimony of Michael L. Chirby.)

Q. You broke the seal and took it out of the box?

A. That is right.

Q. Did you then take it over to install it?

A. Not immediately, no.

Q. What did you do?

A. Well, I set it there on the bench and I called over two or three men to look at the head, what it looked like, and so on.

Q. Speaking of looking at the head, when you saw this head, that is, when you took it from the box, I will ask you if the blades of the head were in the same position they are now. I mean the arms and the blades.

A. No, sir.

Q. Where were they?

A. They was—one was here, the bottom head was setting just like it is (indicating). This was around here, and one was here and other blade was over in here, and one here (indicating). It was so that they would cut alternately.

Q. If I understand you correctly, and so the jury can perhaps have a clearer conception, is it your testimony that this upper cutter was placed, was in such a position that the lower—a lower was here and an upper here and a lower here, they alternated?

A. That is correct.

Q. In other words, they were not parallel? [45]

A. That is correct.

Q. If you look down upon it, then, it would look like it had six blades, instead of three, like it looks now?

A. That is right.

(Testimony of Michael L. Chirby.)

Q. Do I understand that is what you say?

A. Yes.

Q. When you took that raiser head from the container—for the purpose of clarity shall we designate the lower three cutters as part 1 and the upper cutters, one of which is broken off, but which was three cutters, as part 2?

My question, Mr. Chirby, is when that was taken from the box by you was cutter No. 1 and cutter No. 2 in a fixed position, and it was one unit?

A. That is correct.

Q. You didn't put cutter No. 2 on this spindle?

A. No, sir.

Q. It was already placed there?

A. It was intact.

Q. In the position in which you have described?

A. Yes.

Q. In alternate positions? A. Yes.

Q. What do you call this (indicating)?

A. That would be the shaft.

Q. The upper cutter then—— [46]

A. Of the lower part.

Q. The upper cutter was fixed to the shaft?

A. Yes.

Q. You didn't put it on? A. No, sir.

Q. Now, did you observe, when you looked at this cutter, where the pins on the two arms and where this pin was, in relation to the shaft? That can be answered yes or no. Did you? A. Yes.

(Testimony of Michael L. Chirby.)

Q. Were they in the position at that time as they are now? A. No, sir.

Q. Where were they?

A. This Allen screw here (indicating).

Q. Pointing to the screw in the arm of the upper cutter?

A. It is an Allen screw. It fits over here on a flat spot—flat filed, rubbed-off spot.

Q. On the shaft?

A. Yes, right there (indicating). There is supposed to be a pin in here, which fits in this keyway (indicating).

Q. Did you observe whether that pin was there?

A. Well, at the time you cannot notice. It is flush.

Q. Was there a hole there as there appears now (indicating)? [47] A. No.

Q. There was something in there?

A. There was.

Q. You wouldn't observe it was flush with the screw? A. That is right.

Q. What do you call those?

A. Allen screw.

Q. You did observe this Allen screw and this Allen screw (indicating)? A. Yes.

Q. Instead of being in their present position they were over where they would be parallel with the flat open shaft? A. That is right.

Mr. Olson: The jury cannot see that part. This is the groove (indicating) where Mr. Chirby has

(Testimony of Michael L. Chirby.)

testified a pin was, which you can't see because it was flush, it was here in this groove (indicating).

These here and here (indicating) were in such a position that you will notice—you will have an opportunity to observe these. There are flats on the shaft. It is his testimony that those pins were over here, where this one would be against this flat, and this one would be against this flat (indicating), the flat on the shaft.

Q. (By Mr. Olson): Then you went over and installed that [48] panel raiser head, is that correct?

A. Correct.

Q. What did you install it upon?

A. On the double spindle shaper, a Porter shaper.

Q. Porter double spindle shaper? A. Yes.

Q. Will you explain to the jury, Mr. Chirby, what a spindle is?

A. A spindle is a shaft running vertically up and down.

Q. I have here a pamphlet put out by the Porter Company. I understand this was a Porter shaper you installed, this part? A. That is correct.

Q. I call your attention to the photograph contained on the front page of that pamphlet, and ask you if that is a picture of the shaper on which you installed this panel raiser head?

A. It is the same fixture.

Q. That is the same shaper?

A. It looks the same.

(Testimony of Michael L. Chirby.)

Q. Calling your attention to page 3 of the same pamphlet, is that another picture from another angle? A. That is from the front side.

Q. Will you point out to me, so I, in turn, may point out to the jury, from this picture on page 3 what you mean [49] when you say "spindle"?

A. This part right here (indicating). It runs all the way down to the bottom here (indicating).

Q. Do I understand you to mean the spindle is what any cutter is installed upon?

A. That is correct.

Mr. Olson: I call your attention, ladies and gentlemen, to this. This is the flat table. The wood is held on this table. He pointed to the device that strikes out. The mechanism fits over it. That is what it is connected to.

I will offer this in evidence as Plaintiff's next in order.

The Court: All right.

Mr. Olson: I particularly referred in the testimony to the front page and page 3.

The Clerk: Is this admitted, Your Honor?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 3 in evidence.

(The document referred to was marked Plaintiff's Exhibit 3, and was received in evidence.)

A Juror: I would like to take a look at it.

Mr. Olson: I will call to the attention—the box is pretty big——

(Testimony of Michael L. Chirby.)

The Court: Just give it to the juror. Do not make any comment. [50]

Mr. Olson: Page 1 and page 3.

Q. (By Mr. Olson): You then, as I understand it, took that particular panel raiser head over to the Porter shaper, as you identified it in Plaintiff's Exhibit 3, and installed it? A. That is correct.

Q. Will you explain to the jury in as much detail as you can exactly what you did and how your performed this installation?

A. Well, first, if there is a pair of knives in the—on the spindle between collars that has slots, I take that—

Mr. Callaway: Just a moment, your Honor. I think the witness ought to be instructed the question was did he on this particular one.

The Court: Do not say what you would do. Just what you did on this one.

The Witness: I taken this head to the shaper and slipped it down on the shaft and put a three-quarter-inch collar on top of that and put the nut on and took the wrench and tightened it down.

Q. (By Mr. Olson): Is there any device on that panel raiser head which would—does it have, that panel raiser head, any bore or screws in the inside of the shaft?

A. No, there isn't anything in there. It is smooth inside. [51]

Q. What then on that panel raiser head is the security for that raiser head on the spindle?

(Testimony of Michael L. Chirby.)

A. Well, the security of it is by tightening the nut down securely enough to hold it.

Q. Is that the way all raiser heads are held?

A. That is correct.

Q. Did you bring with you the nut that you used on the tightening of this particular raiser head?

A. I did.

Q. You know it is the same nut that was used on this panel head when it broke? A. Yes, sir.

Q. How do you know that?

A. Well, it is a right-hand thread and it is on a right-hand spindle.

Q. Is it the only one you have on that machine?

A. On the machine, yes.

Q. It was the same one that was used at the time Mr. Byrne was injured?

A. That is correct.

Q. Did you bring with you the device you used to tighten that nut? A. Yes, sir.

Q. Is it the same device you used to tighten the nut on this particular panel head? [52]

A. That is correct.

Q. This is the device you used to tighten, that you used on this particular panel raiser head when it was placed upon the Oliver shaper?

A. That is correct.

Q. You tightened it with this wrench (indicating)? A. That is correct.

Q. Will you explain to the jury how that is done?

(Testimony of Michael L. Chirby.)

A. Well, this is the right-hand thread and washer fits on there and turns on (indicating), and then you take this wrench and tighten it up with all the strength you have, and then give it another turn if you can.

Q. Now, the spindle on the shaper, when this is placed upon it, sticks out in the air considerably?

A. Yes, it does. It has about four inches of thread on it.

Q. What do you use to make up for that distance? A. Collars.

Q. In other words, as I understand it, to get a rough idea, this is placed on a spindle and the spindle is what sticks up to about here (indicating)?

A. That is correct.

Q. The screw stays here, but when you have that distance you would put collars on that, so that when this is affixed it is down on collars which, in turn, are on top of that? [53]

A. That is right, with the exception of I must have a full nut of thread so it will be secure and safe.

Q. In other words, you adjust the collars to the point where you have a full nut of thread?

A. That is right.

Mr. Olson: I will offer these in evidence as Plaintiff's next in order.

The Court: They may be received.

The Clerk: Plaintiff's Exhibits 4 and 5 in evi-

(Testimony of Michael L. Chirby.)

dence. Plaintiff's Exhibit 4 being the wrench and Plaintiff's Exhibit 5 being the nut.

(The articles referred to were marked Plaintiff's Exhibits 4 and 5, respectively, and were received in evidence.)

Q. (By Mr. Olson): What is the circumference of the spindle on this particular shaper?

A. An inch and a quarter.

Q. What is the bore of this particular raiser head?

A. Inch and a quarter.

Q. In other words, when that particular raiser head is placed upon the spindle it is a tight fit?

A. It is snug, yes.

Q. You say you placed that raiser head on the shaper and you used the wrench now in evidence, which you have identified, and you tightened it as much as it will go? [54]

A. Yes sir.

Q. Did you tighten any of the screws on the raiser head itself?

A. Yes, sir.

Q. What did you use to tighten those?

A. Used an Allen wrench and also socket wrenches.

Q. After you had installed this raiser head on the shaper, what else did you do, if anything?

A. I started the machine up and put a board through, to see how the reaction was, whether there was any vibration or anything at all.

Q. Did you find any vibration?

A. No, I did not.

Q. Did you find that there was any indication

(Testimony of Michael L. Chirby.)

that anything of any nature was wrong with this raiser head or wrong with your installation of it?

A. No, sir.

Q. Who was present when you put this on and ran that board through it and tightened all these screws?

A. Bill——

Q. Mr. Byrne?

A. Mr. Byrne. Glen Gatewood and myself—and who else? Someone else was there. I don't know who it was. There was four of us there.

Q. Did anybody else, to your knowledge, test that raiser [55] head's installation after you were there?

A. Yes sir. There was Glen Gatewood who tested it.

Q. Were you there?

A. Yes.

Q. What did he do?

A. I was there.

Q. What did he do?

A. He run another board through it, the same as I did.

Q. Were any other tightening processes made after it had been run a while?

A. After it had run a little while I tried it again for tightness, and it was tight.

Q. Did anybody else test it, to your knowledge, besides you and Mr. Gatewood?

A. No.

Q. Do you know, to your personal knowledge, how many revolutions per minute that particular Oliver shaper will make?

A. That machine turns over 7200 revolutions per minute..

(Testimony of Michael L. Chirby.)

Q. Is that the maximum?

A. That is the maximum.

Q. Did you test it?

A. Yes, sir, I had an indicator on it.

Q. Did you know that that raiser head had broken on October 28, 1948?

A. Repeat the question, please. [56]

Q. Did you know that that raiser head had broken when the plaintiff, Mr. Byrne, was using it on October 28, 1948?

A. Yes, I know it was broken.

Q. How did you first become aware there had been an accident?

A. One of the boys came and told me.

Q. What did you do when you heard about it?

A. I went up there about two hours later.

Q. You didn't go immediately after the accident?

A. No.

Q. When did you first see that panel raiser head after the accident?

A. Well, it was still on the machine about two hours after the accident.

Q. You saw it then? A. I did.

Q. Did you examine it? A. Yes sir, I did.

Q. Aside from the holes here and these holes here, which were made for chemical analysis, et cetera (indicating), is that shaper as it now sits there, that raiser head as it now sits there, in substantially the same condition as it was when you observed it after the accident?

(Testimony of Michael L. Chirby.)

A. Counsellor, I don't understand the question.

Q. Well, I will put it this way: Is that raiser head, [57] or does that raiser head look to you now, with the exception of these holes that have been drilled in it, obviously, as it did when you saw it after the accident on the machine?

A. That is right.

Q. Are the cutters in the same approximate position as they were when you saw it on the machine?

A. Yes, sir.

Q. It is your testimony they weren't in that position when you installed it?

A. No, sir.

Q. Did you see this hole in the broken-off arm when you saw it, when it was on the machine?

A. Yes, sir.

Q. Is it substantially the same shape and form and depth as it was when you observed it?

A. Absolutely.

Q. Did you measure the depth of that hole?

A. No, sir.

Q. You looked at it and you saw a hole, and the hole looked the same as it does now?

A. That is correct.

Mr. Olson: I think that is all.

The Court: Cross-examine. [58]

Cross-Examination

By Mr. Callaway:

Q. Mr. Chirby, at the time you installed this device, as far as you know, there was one pin into this

(Testimony of Michael L. Chirby.)

key slot and two more against the flat here, is that right (indicating) ?

A. Two Allen screws was against the flats.

Q. An Allen screw is a screw that has a flat surface on the end, so that it fits flat against the flat on the shaft, does it not? A. That is correct.

Q. Then over here where you have the key slot there was another pin (indicating)? There was also another pin inserted into this key slot, was there not, to hold——

A. Supposedly.

Q. In so far as you could ascertain wherever the hole is, it was closed, was it not, opposite the key slot?

A. That is correct—not opposite, directly by——

Q. That is what I meant, directly by. It was directly by, so it would engage the key slot?

A. That is right.

Q. Is this screw that I hold in my fingers the one that was opposite the key slot?

A. Just what do you mean?

Q. Here is what I mean: I am not trying to confuse you. Show us on here which hole was opposite the key slot. [59]

A. Here you are. This one here was right there on the key slot (indicating).

Q. I get it. So that when you installed this the hole here was opposite the key slot (indicating).

A. Yes.

Q. It had a pin in it? At least, it was flush with the outside of the——

(Testimony of Michael L. Chirby.)

A. That is correct.

Q. I see. Now, when this came to you in the box were these cutters installed? By that I mean the cutting edges?

A. They were.

Q. They were in position?

A. They were in position.

Q. Did you change their positions or adjust them any before you put the device on the shaper?

A. I did not.

Q. I take it that they are adjustable, so that if you want a wider or narrower cut to be made you adjust them up or down?

A. Well, they are adjustable for depth but not for width.

Q. I understand. You can't make them any wider this way, but you can change them that way (indicating).

A. That is correct.

Q. So that at the time you installed it the cutting [60] edges were in place to give you the amount of cut that you wanted to make in the board?

A. Exactly.

Q. Now, did you ever install one of these before, one of these heads?

A. Yes, sir, I have.

Q. The same make, of the Woodworkers'?

A. I don't remember.

Q. Had you ever seen one before, Woodworkers'?

A. I had not.

Q. Now, when you came back there two hours later was the pin that was inserted opposite the key-hole sheared off?

(Testimony of Michael L. Chirby.)

A. It was just like it is right now, sir.

Q. Well, did you make any effort to determine whether or not there was any shearing off of the end of that pin?

A. Evidently there was a shearing off because the hole was showing.

Q. In other words, the pin that had been in there was missing, is that it?

A. That is correct.

Q. How about the Allen pins on the other side where the flat is? A. They are still there.

Q. But they appear to be distorted, do they not? Or does this look just like it did when you put it in? [61]

A. They look just exactly like I put them on, like they were when I received the head.

Q. Did you make any examination to determine whether those Allen pins were in tight when you installed them? A. Yes, sir, I have.

Q. I mean, did you before you put this device on, did you determine whether or not they were tight?

A. I tightened them.

Mr. Olson: That is already testified to. That is repetitious. He testified he tightened them.

The Court: That is all right. This is cross-examination. Go ahead.

Q. (By Mr. Callaway): You tightened them up before you put the device on?

A. That is correct.

The Court: I did not understand which pin was sheared off.

(Testimony of Michael L. Chirby.)

The Witness: This one, your Honor (indicating). There was a pin in there (indicating).

The Court: In other words, that was gone.

The Witness: It fit in this slot right there (indicating). That was gone.

The Court: You put that in?

The Witness: No, sir.

The Court: It was there when you put it in? [62]

The Witness: It was there when I put the head on.

The Court: But when you saw it again that had disappeared.

The Witness: That was gone, yes.

The Court: Did you try to find out what became of it, whether anyone had dropped it when they took it apart, or what?

The Witness: It is so small, your Honor, I wouldn't even attempt to look for it.

The Court: You would not attempt to look for it. You would look for it before you installed it because the equipment would not be complete, would it, without it?

The Witness: I could not see it, your Honor, because this was flush, just as smooth as that is (indicating). You couldn't hardly see there was a pin in there. That hole was directly opposite of this slot (indicating).

The Court: You are talking about the time you examined it?

The Witness: Yes, at the time I put it on.

(Testimony of Michael L. Chirby.)

The Court: To use the language of patent lawyers, that is a missing member, as we would call it?

The Witness: That is correct.

The Court: Patent lawyers like to say member. Everything is a member of something.

Q. (By Mr. Callaway): In order to disassemble this top [63] member you would loosen the Allen pins and simply slip the member off the shaft by letting the pin that fits in the slot come up, would you? Is that right? A. That is correct.

Q. Now, how often when those heads are in operation do you adjust the blades That is, where they are being used all day.

A. All day?

Q. Yes. I will put it to you this way: I will ask you a leading question. Don't you adjust those blades three or four times a day, where the machine is in constant use? A. Indeed not.

Q. Well, how often would you say that they require adjustment?

A. As long as they are doing the proper work they do not need adjusting.

Q. Let me ask you this: Have you had enough experience with this particular cutting head to know how often, when you are cutting soft wood, fir or pine, that the blades have to be adjusted?

Mr. Olson: May I interrupt? I don't mean to interrupt, really. What do you mean "adjust"? Do you mean adjusted for the cut or just tightened?

Mr. Callaway: Either tightened or adjusted for the cut.

(Testimony of Michael L. Chirby.)

The Court: Yes. All right. Go ahead. If you can answer, [64] answer the question.

The Witness: The only time that I——

Q. (By Mr. Callaway): My question is, have you had enough experience with that particular type or make of head——

The Court: Mr. Callaway wants to know if you have had enough experience to know.

The Witness: Yes, I have.

Q. (By Mr. Callaway): With that particular make of head?

A. Not this particular type of head, but with similar ones.

The Court: Would the absence of that pin have any effect on the operation?

Mr. Olson: Which pin, your Honor?

The Court: The pin that is gone now.

The Witness: This pin, your Honor (indicating)?

The Court: Yes.

The Witness: Yes, it would.

The Court: What would be the effect?

The Witness: The effect would be that it wouldn't be the strength required.

The Court: It might not affect the structure of the entire mechanism?

The Witness: It would not affect the structure.

The Court: All right.

Q. (By Mr. Callaway): Well, if the pin was gone that fit [65] into the slot, then the only pressure that will hold the top member in place would

(Testimony of Michael L. Chirby.)

be the Allen pins on the flat side?

A. That is correct.

Q. That would tend to cause the top member to be movable, provided you overcame the pressure applied by the Allen pins around on the shaft, wouldn't it? A. It would.

Q. Now, let me straighten this out. You have referred to a Porter shaper you installed this on, and Mr. Olson referred to an Oliver shaper. Which was this? A. A Porter.

Mr. Olson: I meant a Porter shaper.

The Court: All right.

Q. (By Mr. Callaway): At what revolutions per minute was the machine regulated to when this head was installed? A. 7200 revolutions per minute.

Q. In other words, it was at its highest?

A. That is correct.

Q. The maximum.

A. It runs at its highest at all times.

Mr. Callaway: I think that is all.

Redirect Examination

By Mr. Olson:

Q. You stated that the Allen pins were just like they are now when you saw the device, the member, after the accident? [66]

Mr. Callaway: No, he didn't. He didn't state that. He said they appear to be distorted.

Mr. Olson: I think his testimony was——

Mr. Callaway: All right.

Q. (By Mr. Olson): They were just as they are

(Testimony of Michael L. Chirby.)

now, they were that way after the accident, isn't that what you said? In other words, those Allen——

The Court: Give the witness a chance to answer. You are starting another question.

The Witness: They were at the time of installation——

Q. (By Mr. Olson): No. I am not talking——

A. ——on the flat spots.

Q. I am not talking about that. I am talking about—are the Allen pins in the same condition—what was the word used—do they look the same to you now as they did after you examined that, after the accident?

A. Yes, they look the same to me.

The Court: If you remove the Allen pins, and assume the other pin was against the cut there, would it not take quite a pressure to pull that off, nevertheless, without the Allen pins in there?

The Witness: I believe it would.

Q. (By Mr. Olson): In other words, if you took the Allen pins out now and that other pin—what do you call it, a cotter pin—— [67]

A. That is a keyway.

Q. All right. If the keyway was in and you took the Allen pins out, you couldn't take it and pull it off the shaft with your hands, could you?

A. No. You would have to pry it off.

Q. Did you tighten the cutters before you installed that? A. Yes.

Mr. Olson : That is all.

(Testimony of Michael L. Chirby.)

Recross-Examination

By Mr. Callaway:

Q. Did Mr. Byrne assist you in any way in installing this machine?

A. It is not his work, sir.

Q. I didn't ask you that. I asked if he assisted you in any way in installing the device?

A. No, sir.

Q. Did he assist you in any way in adjusting or installing the cutting blades? A. No, sir.

Q. Let's straighten this out. This pin that fits into the slot, that doesn't have any indentation for a screwdriver to fit in, or anything of that sort? That smooths down to the same surface as the shaft, is that right? A. That is correct. [68]

Mr. Callaway: That is all.

Mr. Olson: Was Mr. Byrne present when you installed that part?

The Witness: Yes, sir.

Mr. Olson: That is all.

Mr. Callaway: Who is Mac, may I ask? Who is Mac?

The Witness: Mac?

Mr. Callaway: Yes. Some fellow that worked out there you called Mac.

The Court: He did not mention a Mac.

Mr. Callaway: You don't remember him?

The Witness: No.

Mr. Callaway: That is all.

The Court: Step down.

(Witness excused.)

The Court: It might be a good idea to pass Plaintiff's Exhibit 2 to the jury.

Mr. Olson: All right. This is very heavy and very dangerous. I will give you the box with the other parts in it.

The Court: Call your next witness.

Mr. Olson: Mr. Leewenkamp. [69]

CORNELIUS LEEWENKAMP

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Cornelius Leewenkamp.

Direct Examination

By Mr. Olson:

Q. Mr. Leewenkamp, where are you employed at the present time?

A. Associated Manufacturing Company, Pasadena.

Q. As a salesman? A. Yes, sir.

Q. Were you employed by the Selby Company in the month of October of 1948? A. I was.

Q. Speak up, Mr. Leewenkamp, so we can all hear you. You were? A. Yes.

Q. In what capacity were you employed?

A. I was shop superintendent.

(Testimony of Cornelius Leewenkamp.)

Q. Of Selby's? A. Yes.

Q. Did your duties concern themselves with having anything to do with the wood in the shop being used? [70] A. Yes, sir.

Q. What were those duties concerning wood?

A. To see that we had an adequate amount of pine in the shop for the production for the following day, as well as the operating day.

Q. Were you working in the shop on the day of October 28, 1948? A. Yes, sir.

Q. Do you know what kind of wood Mr. Byrne was working with on that date? A. White pine.

Q. Where was that white pine kept that Mr. Byrne was working on?

A. You mean before?

Q. Before the accident? It was kept outside and then brought inside the plant.

Q. Do you know when this particular lot of white pine was brought inside the plant, to be machined?

A. Yes, sir.

Q. When?

A. It was brought in approximately 3:00 o'clock a Wednesday afternoon. The date I cannot be certain of.

Q. Do you know what was done with the wood when it was brought in? [71] A. Yes, sir.

Q. Will you explain to the jury and court what was done?

A. The lumber was brought in. It was random lengths and widths. It was cut up into 37-inch-length pieces. It was also ripped.

(Testimony of Cornelius Leewenkamp.)

Q. What do you mean by "ripped"?

A. It was taken to a joiner and one edge joined first. Then it was taken to a rip-saw, which is a table saw with a ripping blade on it, and it was cut to widths, such as 5, 6, 7, and 8 inches in width.

Then it was taken to the sander and sanded two sides of it, and then taken to the shaper which Mr. Byrne was operating, to make the raised panels for the doors.

Q. Did the men who perform those operations you just described have any instructions regarding finding any knots or foreign substances in any wood they cut? A. Yes.

Q. Who gave those instructions?

Mr. Callaway: I object to that as being self-serving, and hearsay.

The Court: I cannot see the materiality of that. I will sustain the objection. We are concerned with this particular piece of wood. The objection will be sustained.

Q. (By Mr. Olson): You recalled this particular lot of wood that Mr. Byrne was cutting, is that correct? A. Yes.

The Court: If he knows what was done, all right. What instructions were given is not material, that were given in general.

Q. (By Mr. Olson): Do you use wood with knot-hole sin it for the purpose of making panels?

A. No, sir.

Q. Why?

(Testimony of Cornelius Leewenkamp.)

A. Because the doors that we were making at the time were supposed to be knot free.

Q. I don't know what you mean.

A. Eliminating all knots and blemishes in the wood, to make a perfect door.

Q. Do you allow pit pockets or any blemishes in this particular wood? A. No, sir.

Mr. Callaway: I cannot hear you.

Mr. Olson: I am sorry.

Q. (By Mr. Olson): Were you in the plant when this panel raiser head was installed on the shaper? A. Yes, sir.

Q. Did you have occasion to see this panel raiser head before it was installed? A. I did. [73]

Q. Where did you see it?

A. I saw it when Mr. Chirby took it out of the container, out of the box that it was shipped in.

Q. You were present when he took it out of the container? A. I was.

Q. Was the box sealed? A. It was.

Q. When you saw that panel raiser head when it was taken from the box were the arms of the cutters in the same position as they are now?

A. No, sir.

Q. Will you explain to the jury in what position they were, as distinguished from what position they are now?

A. I believe you call this No. 2, don't you, and this No. 1 (indicating)?

Q. For clarification, we will call the upper cutter No. 2 and the lower cutter No. 1.

(Testimony of Cornelius Leewenkamp.)

A. This No. 2 cutter was turned so that this arm was between these two here (indicating). In other words, it was sticking out right here, and that made all three of them come in between these two (indicating).

Q. In other words, it would be the same as though I would take that and turn it about three-quarters of an inch, so this would be over here and this over here and the broken [74] arm, if it were there, would be here between the lowers (indicating)?

A. That is correct.

Q. That is the way it was when taken from the sealed box?

A. Yes.

Q. Did you observe whether this arm was on it when it was taken from the sealed box?

A. It was.

Q. Did you observe whether this blade was broken when taken from the sealed box (indicating)?

A. It was not broken.

Q. Were these drill holes, a part of No. 2 and a part of No. 1, drilled in there at that time?

A. No, sir.

Q. Were you present when Mr. Chirby installed that part on the shaper?

A. No, sir.

Q. Did you witness the accident?

A. No, sir.

Q. Did you know there was an accident on October 28th in which Byrne was involved?

A. Yes, sir.

Q. How did you know about it?

(Testimony of Cornelius Leewenkamp.)

A. From one of the other men in the plant. [75]

Q. Did you go over to the scene of the accident?

A. Not immediately, no.

Q. But you did go?

A. Approximately two hours after the accident happened, yes.

Q. Was that panel raiser head on the shaper when you got there? A. Yes, sir.

Q. Did you observe it? A. Yes, sir.

Q. Was it in substantially the same condition as you find it now? A. Yes, sir.

Q. Getting back to the time you saw the shaper when it was taken out of the box, did you notice whether that hole that I am pointing to on part No. 2 was there?

A. I couldn't say. I don't—I couldn't answer that.

Q. You don't know whether it was there or not?

A. No, I didn't look that close. It was apparently hard to see.

Q. Was that hole there when you looked, after the accident when you looked?

A. I don't remember—yes.

Q. Yes, that hole was there?

A. That hole was there. [76]

Q. Did you observe this broken arm when you saw it after the accident (indicating)?

A. I did.

Q. Was this hole, which I designate as a blow-hole, present when you saw it after the accident?

(Testimony of Cornelius Leewenkamp.)

A. Yes.

Q. And it was approximately the same size and shape as it is now? A. Yes.

Q. I understand that this cutter was broken off, is that correct (indicating)? A. Yes.

Q. But these little holes, the drill holes, weren't there? A. No.

Q. To your knowledge was the soft pine which Mr. Byrne was cutting on the occasion of this accident wet? A. No, sir.

Q. How do you know it wasn't wet?

A. Well, to my knowledge the lumber had been tested with some type of an indicator. I don't remember the name. I don't recall the name of the indicator. To my knowledge, it was dry.

Q. The test you refer to, is that a test for lumber wetness? [77] A. Yes.

Mr. Olson: I think that is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Callaway:

Q. Mr. Leewenkamp, did you give this cutter at any time to Mr. Byrne to install? A. No, sir.

Q. Did you have an employee there that was known as Mac at that time?

A. I don't think so. There are so many men here it is hard to say.

Q. All right. Did you give any of the blades to Mr. Byrne to install? A. No, sir.

(Testimony of Cornelius Leewenkamp.)

Q. Do I understand you correctly that you gave the whole—you didn't have any extra blades, I take it?

A. No, sir.

Q. You gave the whole machine that was boxed up, or the device that was boxed up to Mr. Chirby?

A. To Mr. Chirby, yes.

Q. Did you see him install this?

A. No,

Mr. Callaway: That is all.

The Court: Did you see him take it out of the box? [78]

The Witness: I did.

Mr. Callaway: I take it it was a new device and you examined it rather closely.

The Witness: Yes.

Mr. Callaway: You did not see anything that appeared to be wrong with it, did you?

The Witness: No.

Mr. Callaway: It looked like a well-machined new tool?

The Witness: To my knowledge, yes.

Mr. Callaway: That is all.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Olson: Mr. Byrne.

WILLIAM J. BYRNE

the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: William J. Byrne.

Direct Examination

By Mr. Olson:

Q. You will have to keep your voice up, now, Mr. Byrne, [79] so we can all hear you. Where do you reside? A. In Alhambra.

Q. Are you married? A. Yes, sir.

Q. Do you have any children? A. Yes, sir.

Q. How many? A. Two.

The Court: Is he an expert?

Mr. Olson: No. I am introducing him to the jury. He is the plaintiff.

The Court: All right. I didn't get his name.

Q. (By Mr. Olson): How old are you?

A. Thirty-four.

Q. Were you ever employed by the Selby Company? A. Yes, sir.

Q. When were you first employed?

A. Oh, about October of 1948.

Q. Were you ever employed by any woodworking concerns before you were employed by the Selby Company? A. Yes, sir.

Q. Which ones?

A. Glendale Lumber Company.

(Testimony of William J. Byrne.)

Q. Any others? A. No, sir. [80]

Q. How long did you work for the Glendale Lumber Company? A. About three years.

Q. What were your duties there?

A. I had charge of the mill, the saws, the planers, joiners, the bandsaws.

Q. You worked with those kinds of devices for about approximately three years, is that correct?

A. Yes.

Q. Before you got your job with Selby?

A. Yes, sir.

Q. When you were employed by Selby, what capacity were you employed in?

A. Well, I was classed as a millman.

Mr. Callaway: I move to strike that out, as to what he was classed as, as not responsive.

The Court: That is not an objection. We do not follow the absurd rule some of you lawyers have had the legislature write into the statute books, that an answer is not good if it is not responsive. A witness can give facts.

Mr. Callaway: Your Honor, we practice so much in the State Courts——

The Court: I know that. We are not required to follow the State rules. If we follow them we are warned by the Rules to favor rules that favor admissibility, rather than [81] those that exclude. Since the new rules were enacted not a case has been reversed in the Circuit Court of Appeals in 12 years on admissibility of testimony.

Q. (By Mr. Olson): What were your duties

(Testimony of William J. Byrne.)

when you were employed by Selby Company?

A. To run the sander, the shaper, the cutoff saw, the table saws, and to check the material.

Q. What were your earnings in October of 1948 from the Selby Company?

A. I believe it was \$1.50 an hour.

Q. \$1.50 an hour. How many hours a week did you work?

A. It varied. Sometimes we had overtime.

Q. The average? A. 40 to 48.

Q. 40 to 48 hours a week? A. Yes, sir.

Q. Have you ever worked with panel raiser heads or cutters of that nature before?

A. Yes, sir.

Q. The last place you said you worked, before, what was the name of that place?

A. Glendale Lumber Company.

Q. At that place you used cutters of that nature?

A. No.

Q. Where did you use them? [82]

A. At the Selby Company.

Q. Calling your attention to October 28, 1948, did you receive an injury on that date?

A. Yes, sir.

Q. What did you do? What were you doing just before you received this injury?

A. I was running a panel through this raiser head.

Q. Getting back to that raiser head, when did you first see that raiser head?

A. About a day and a half before it was in-

(Testimony of William J. Byrne.)

stalled.

Q. Where did you see it? Where did you first see it?

A. When it was brought over to the machine to be installed.

Q. By whom was it brought over to the machine to be installed? A. Mr. Chirby.

Q. You watched him install it?

A. Yes, sir.

Q. Did you assist in the installation?

A. No, sir.

Q. Did you observe Mr. Chirby or anyone else test the apparatus as installed, after it had been installed? A. Yes, sir.

Q. What test did you observe them to make?

A. For fitness, testing. [83]

Q. That is a conclusion.

A. Testing the shaft for looseness, straightness and testing the depth of the cut, and so on.

Q. Did you make any test?

A. After it was installed I took the wrench that Mr. Chirby used to tighten the top of this cutter head, to make sure myself that it was tight.

Q. Did you give it a preliminary run after you did that? A. Yes, sir.

Q. Did you notice any vibration?

A. No, sir.

Q. By the way, when you did take this wrench, could you get any more turn to it? A. No, sir.

Q. Is this the wrench you used (indicating)?

A. Yes, sir.

(Testimony of William J. Byrne.)

Q. To your knowledge is this the bolt that was used to attach this to the spindle on the shaper?

A. Yes, sir.

Q. Calling your attention to Plaintiff's Exhibit No. 3, I will ask you if this picture that appears in the front cover is a picture of the shaper upon which you were working. Not the exact one, but the same type of shaper you were working on at the time of the accident? [84]

A. Yes, sir.

Q. You say that the man in that photograph is standing in a similar or almost exact position as you were at the time of the accident?

A. Yes, sir.

Q. Calling your attention to page No. 3 of the same pamphlet again, is that a picture of the same type of device upon which you were working?

A. That is the front side of it.

Q. The picture on the front is what?

A. It is looking at it endways.

Q. Will you show me on the picture on page No. 3 what is the spindle?

A. It is this middle part coming up through the table here (indicating).

Q. You are pointing to the shaft coming up outside the top of the table?

A. Yes.

Q. At the time of the accident were there two cutters on this shaper or only one?

A. I don't believe I understand your question.

Q. At the time of the accident were there two raiser heads installed or just one?

A. Just the one.

(Testimony of William J. Byrne.)

Q. In other words, the other spindle wasn't being used? [85]

A. That is right.

Q. What kind of wood were you working with at the time of the accident? A. Pine.

Q. Calling your attention to Plaintiff's Exhibit 1, is this similar to the wood upon which you were working at the time of the accident?

A. That is very similar to it.

Q. Is it the same, approximately the same width and length?

A. To the best of my knowledge it is the same length. I believe it may have been an inch or two wider.

Q. Which may have been——

A. This way (indicating).

Q. Which one? This may have been, or yours?

A. Mine.

Q. The one you were working on might have been wider than this? A. Yes.

Q. Will you show the jury this, assuming this is the platform of the shaper (indicating), what you were doing with that wood at the time of the accident?

A. This cutter blade here is revolving, and you take the board and push it through this way, and these arms, when it gets through, comes out to this finished cut (indicating). [86]

Q. In other words, it makes these beveled edges on each side? A. That is right.

Q. And cuts the bottom and the top at the same time? A. That is right.

(Testimony of William J. Byrne.)

Q. To your knowledge had anyone else worked with that panel raiser head, other than you?

A. No, sir.

Q. Before it broke, that is? A. No, sir.

Q. When did you first do any work with it?

A. It was about 3:00 o'clock in the afternoon of the 27th.

Q. What were you working with about 3:00 o'clock, until quitting time, on that date?

A. The same type of soft pine wood.

Q. Doing the same work you have just described to the jury? A. The same type.

Q. What time did you quit?

A. Four o'clock.

Q. What time did you report to work on whatever day it was, October 28, 1948?

A. Eight o'clock.

Q. You immediately proceeded again to go to work? [87] A. Yes.

Q. The same wood and the same panel head?

A. Yes.

Q. Before the accident did you observe anything out of the ordinary about the operation and performance of that panel raiser head?

A. I had just finished checking the panel head and the motor and the belt and the whole machine, before I started it up.

Q. That is not my question. Listen to my question again. A. All right.

Mr. Olson: Will you please read the question.

(The question was read.)

The Witness: No.

(Testimony of William J. Byrne.)

Q. (By Mr. Olson): It worked just like any other cutter you had been working with?

A. Yes.

Q. Now, what time, to the best of your knowledge, did this accident occur?

A. About 8:35 in the morning.

Q. Did you have any warning that it was going to occur? A. I heard a faint click.

Q. While you were working with this wood you heard a faint click? [88] A. Yes.

Q. What, if anything, did you do when you heard that click?

A. I went below the table top.

Q. You dropped below the table top when you heard the click? A. Yes, sir.

Q. Calling your attention again to Plaintiff's Exhibit 3, the front page, you say that is the relative position you were standing in at the time of the accident? A. Yes, sir.

Q. In other words, when you dropped then you would be just where this man would be if he fell down? A. Yes, sir.

Q. Do you know, of your own personal knowledge, how fast that shaper was going at the time of the accident?

(Testimony of William J. Byrne.)

A. It was supposed to be around 7200 r.p.m.'s, revolutions per minute.

Q. You can assume it was going 7200 revolutions per minute when the accident happened?

A. Yes.

Q. As I get it now you heard a sharp click and

(Testimony of William J. Byrne.)

you dropped to the ground? A. Yes.

Q. You dropped to the ground when that happened? [89] A. Yes.

Q. Then what happened?

A. I stayed underneath the table until it had quieted down and things had stopped dropping.

Q. What do you mean "things had stopped dropping"?

A. Well, the piece of board I was working with and in a mill there are certain pipes and so forth around, and whatever broke off of this blade here was coming down—or you could hear something falling. I wanted to stay out of the way.

Q. Then what happened after the place had quieted down?

A. I got up and looked around, to see if anybody was around, or anything. That perhaps somebody would have been hit by whatever flew apart.

Q. Then what did you do?

A. Then I started to look at the machine, to see what happened.

Q. Did you find you were injured yourself in any way?

A. I took a quick look at the machine and then I figured I had better look at myself.

Q. Did you finally look at yourself?

A. Yes.

Q. What did you observe when you looked at yourself?

A. That my hand was cut across the palm, and my little finger was just barely on. [90]

(Testimony of William J. Byrne.)

Q. Was it bleeding? A. Yes, sir.

Q. What did you do next?

A. Well, I grabbed my right hand with my left, and I started to get somebody to take me to the doctor.

Q. Did somebody take you to the doctor?

A. One of the fellows ran and got the owner of the plant and he said that his car was right outside the door, and he took me to the doctor immediately.

Q. What doctor did he take you to?

A. Dr. Detwiler.

Q. Getting back to the shaper, as displayed, again, on page 1 of this Plaintiff's Exhibit 3, was there any guard or device on the top of that shaper surrounding this panel raiser head which is not shown on this picture on the one which you were operating? A. Yes, sir.

Q. What were they?

A. There was a guard in the back of this blade, to keep the material you are running through it from going into the machine too far.

Q. Was the guard on this picture also on there?

A. Yes, sir.

Q. That appears to me to be two steel arms with a board underneath, is that correct? [91]

A. Yes, sir.

Q. What is the purpose of that guard?

A. That is to hold the material from coming up. It is a spring action and it holds down tight on the board that you run through. Just tight enough you can push it through.

(Testimony of William J. Byrne.)

Q. Is it my understanding that when you are pushing that piece of board through this raiser head you have a guard coming down, coming down and pressing it down, and the guard has a spring to it so it stays in between? A. That is right.

Q. Where is the other guard?

A. It comes right across the top of this blade here (indicating). Of course, there is an opening there so the blades can go through.

Q. That guard isn't shown on this picture?

A. No, sir.

Q. But it was present on the shaper which you were using? A. Yes, sir.

Q. Are you right or left-handed?

A. Right-handed.

Q. It was your right hand that was cut?

A. Yes, sir.

Q. You say when you got up off the floor and everything had quieted down you looked at the panel raiser head, is that [92] right? A. Yes.

Q. When did you next see it after that?

A. About a month ago.

Q. Where? A. In your office.

Q. Do you know whether this hole in part No. 2 was there when you observed it being installed? If you don't remember, say so.

A. I don't remember.

Q. You don't know whether there was a pin in there or not? A. No, sir.

Q. Was the position of the arms on the cutter

(Testimony of William J. Byrne.)

at the time it was installed the same as they are now? A. No, sir.

Q. What position were they when you saw it, when you saw Mr. Chirby install it?

A. The top arms were in between the two bottom arms (indicating).

Q. Is that the way most cutters are, that you have used? A. This style is, yes, sir.

Q. When you observed this cutter after the accident, did you observe whether or not the cutter on this upper arm, the blade on this upper arm was broken off? [93]

A. Would you clarify that? Do you mean immediately after the accident?

Q. Yes.

A. At that time I did not notice it.

Q. Did you notice whether this blow-hole was there? A. Yes, sir.

Q. You noticed that right after the accident?

A. Yes, sir.

Q. Did you personally pick up the pieces of this, or did someone else? A. Someone else.

Q. Do you know who? A. No, sir.

Q. Now, what did Dr. Detwiler do for you?

A. He X-rayed my hand, cleaned it out. He checked the X-rays to see what he had to do. He repaired the hand, put the cast on and followed up with periodic checkups.

Q. How many times did you go to Dr. Detwiler? I don't mean exactly, unless you know exactly. Just approximately.

(Testimony of William J. Byrne.)

A. Twice a week for a number of weeks. I don't recall how long, several months.

Q. What did he do when you went to him?

A. He checked my hand for circulation, for reflexes, and the amount of movement I could get into it.

Q. Did he ever sew your hand? [94]

A. It was sewn.

Q. When was it sewn?

A. After he had repaired the tendons and repaired the inside of the hand.

Q. I asked you when is that, the time you went right after the accident?

A. The day of the accident.

Q. You stayed there until all that repair was done? A. Yes.

Q. He X-rayed you and sewed the tendons and sewed your hand? A. Yes.

Q. Did he put it in a cast? A. Yes, sir.

Q. How long did you wear the cast?

A. From October 28th until approximately a week before Christmas.

Q. Was it a plaster cast? A. Yes.

Q. Do you know how much money you owe Dr. Detwiler? Or have you paid him?

A. No, sir.

Q. Did you go to any other doctor besides Dr. Detwiler? A. Yes, sir.

Q. At whose request? [95]

A. At your request and the insurance company's.

(Testimony of William J. Byrne.)

Q. What is his name?

A. Dr. Joseph Boyes.

Q. How many times did you see him?

A. Five or six times, to the best of my knowledge.

Q. What did he do for you, if anything?

A. He checked my hand, my fingers, my grip, and he had me wear a brace, an elastic band on my hand for some time.

Q. Do you know what you owe or what you have paid Dr. Boyes, if anything?

A. No, sir, I don't.

Q. Did you go to any other doctor?

A. Dr. Sutherland.

Q. Did he make an examination of your hand?

A. Yes, sir.

Q. Did he make any recommendations as to what treatment you should have for that hand?

Mr. Callaway: I object to that.

Mr. Olson: I will strike it.

Q. (By Mr. Olson): Will you tell the jury as much as you know what is the matter with your hand right now?

A. My hand will not bend all the way. This finger will not close all the way (indicating). I have a loss of grip in it. I cannot hold anything. In driving a car, if I go to make a left turn I don't have enough strength in it to turn. [96] I can, but my hand will tend to slip off the wheel.

I cannot lift anything as heavy as I used to, and

(Testimony of William J. Byrne.)

it is always numb. With the least bit of cold or dampness it is just like a weight. It also affects this finger and the palm of my hand, where the tendons and bones were broken (indicating).

Q. How much can you bend your little finger, Mr. Byrne? A. (Demonstrating.)

Q. You can't bend it any more than that?

A. No, sir.

Q. Do you have a scar on your hand?

A. Yes, sir.

Q. Is that scar caused by reparative surgery or by the accident itself?

A. To the best of my knowledge it was caused by the accident, where my hand was cut open.

Q. You say you broke the bone in your hand by being hit by this part, you broke the bone in your right finger?

A. This joint here was broken clear through, cut clear through (indicating).

Q. For the purpose of saving time at another time I will have the jury look at that scar. I don't think it is necessary now.

Now, you were out of work after the accident?

A. Yes. [97]

Q. Your hand was in a cast? A. Yes.

Q. You were under medical treatment?

A. Yes.

Q. The accident happened on October 28th, of 1948, did it not? A. Yes, sir.

Q. When were you next employed?

(Testimony of William J. Byrne.)

A. It was on or about the 10th of January, 1949.

Q. That was where?

A. At the Selby Company.

Q. How long did you work there?

A. I believe it was sometime during the first week of February. I don't recall the exact date.

Q. Then you were laid off from the Selby Company?

A. Yes, sir.

Q. Then when did you go to work for anyone else?

A. I did nothing until July.

Q. Of what year?

A. 1949.

Q. You were unemployed until July of 1949?

A. Yes, sir.

Q. And then did you go to work?

A. Yes, sir.

Q. For whom? [98]

A. I worked for myself.

Q. In what business?

A. In the tree business, tree surgery.

Q. Are you acquainted with tree surgery?

A. Yes, sir.

Q. You went into that business for yourself?

A. Yes, sir.

Q. Do you have any employees?

A. Yes, sir, I have to have at least one employee to take my place on account of the loss of grip. I am not able to handle the tools. All I can do is supervise it.

Q. What is your employee's name?

A. William Rollinson.

(Testimony of William J. Byrne.)

Q. How much do you pay him?

A. It varies.

The Court: That is not material. You are not pleading any special damages he pays to an employee, as a loss to himself. There are no special damages asked, other than those incurred for medical care. You have grouped everything into general damages.

Mr. Olson: I agree. I will strike the question. I have redirect examination. I will take it then. That is all.

The Court: May it be stipulated the usual admonition has been given to the jury?

Mr. Olson: So stipulate. [99]

Mr. Callaway: So stipulate.

The Court: We will have a short recess.

(Short recess taken.)

The Court: If you have thought of any more questions you want to ask now, I will not hold you to a technicality, Mr. Olson.

Mr. Olson: Thank you, your Honor.

Q. (By Mr. Olson): Mr. Byrne, one very important question I would like to ask you is this: Who stopped the machine after the panel raiser had disintegrated?

A. The machine is equipped with a foot safety lever that acts as a brake, and also stops the machine.

As I went under the table I put my left foot on the emergency brake, and as I went down my weight topped everything.

(Testimony of William J. Byrne.)

Q. As you went down you stopped the machine?

A. The machine was stopped before I hit the floor.

Q. You did that with the application of the emergency brake? A. Yes.

Q. With your foot? A. Yes.

Q. You operated this panel raiser head for how long on October 27, 1948? A. For an hour.

Q. For how long on the morning of October 28, 1948, before it broke, did you operate it?

A. Approximately 35 minutes.

Q. In that approximately one hour and 35 minutes in which this raiser head was being used, did you find the work it was doing was satisfactory?

A. Yes.

Q. Was it making a good clean cut?

A. It made a smooth cut. There were no obstructions. There were no vibrations. It was performing perfectly.

Q. Is there any particular reason that you now are engaged in the business of tree surgery? Or, has your injury anything to do with the fact you are now engaged in the business of tree surgery?

A. My injury prohibited me from returning to mill work and due to the fact that it has limited the use of my right hand, it has eliminated me from a lot of office work. In other words, I could not get into most offices due to the fact it has impaired my writing. I am not able to use adding machines, or typewriters with efficiency.

(Testimony of William J. Byrne.)

Q. Prior to your injury could you type?

A. Yes, sir.

Q. It is your testimony you can no longer type efficiently?

A. Yes, sir. [101]

Mr. Olson: I think that is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Callaway:

Q. Mr. Byrne, this guard that is shown on Plaintiff's Exhibit 3, that is attached by a couple of rods and, I take it, the length of the guard can be regulated by loosening the rods where they join the back part?

A. Yes, sir.

Q. How do you loosen them, by this little business on top here (indicating)?

A. This handle merely raises it and lowers it, and then they tighten down (indicating).

Q. How do you change the length of them, to make them shorter or longer?

A. To the best of my recollection there are screws in there that tighten the bar down when you get it regulated.

Q. Now, what other type of guard did you say was on the machine?

A. There was a guard that fit along the front of this raiser head.

Q. What type of thing was it?

A. It kept the material from going too far into the machine.

(Testimony of William J. Byrne.)

Q. What type of a guard was it? Can you describe it [102] for us, please, sir?

A. To the best of my recollection it was soft wood and approximately two inches or better in thickness.

Q. How was it attached to the table, if it was attached to the table?

A. To the best of my recollection it was bolted down.

Q. Mr. Byrne, what struck this particular arm that was broken off? A. That I do not know.

Q. I take it, of course, that at the speed at which this top member was traveling that you couldn't determine whether the arm was broken before the slipping took place on the shaft or afterward? A. No, sir.

Q. Now, you didn't push that guard that you had your left hand in against that, did you?

A. No, sir.

The Court: Have you any recollection when you first felt that you were bleeding or had a cut, after you dropped under the table?

The Witness: After I got up from the floor, your Honor.

The Court: You have no recollection of feeling anything like a cut in your hand as you dropped below?

The Witness: My right arm was numb.

Q. (By Mr. Callaway): Now, the thing that made you [103] drop below was that you heard a slight click, is that right? A. Yes, sir.

(Testimony of William J. Byrne.)

Q. It is not unusual, in operating machines like this, to hear a click of the bearing, is it?

A. When a person has operated woodworking tools for some time they get to differentiate the different sounds connected with the particular machine they are running. There is a difference of sound between hitting metal and hitting, we will say, a knot, or something snapping.

Q. You had only operated this particular machine an hour and 35 minutes before this happened, is that right?

A. Yes, sir.

Q. Well, now, the thing that you were thinking about as you went under was to get the machine cut off, to get to the emergency, was that right?

A. Well, the emergency is in such a position that you would automatically fall on it.

Q. Let me ask you this: Is there any other pushbutton device, or anything like that that you could turn the power off and stop the machine with?

A. There is the off and on switch; that will not stop the shaft.

Q. That just stops the motor?

A. Yes, sir.

Q. Now, it is my understanding that the first time you [104] ever saw this particular machine was when you saw Mr. Chirby putting it on the spindle?

A. That is the first time I have seen this particular one.

Q. You didn't assist him in any way?

A. No, sir.

(Testimony of William J. Byrne.)

Q. Did you make any adjustment on the machine at any time other than the one you told us about, testing the nut to see if that was tight?

A. No, sir.

Q. You recognize that blond gentleman sitting in the second row back there, the gentleman sitting right behind Mr. Chirby (indicating)?

A. No, sir.

Q. What is it? A. No, sir.

Q. His name is Taylor.

A. I don't know Mr. Taylor.

Q. Did you have a conversation with him at your residence on November 18, 1948?

A. I may have told a representative of the insurance company——

Q. You mean your employer's insurance company? A. Yes.

Q. As a matter of fact, he made himself known to you as [105] being a representative of the Selby Company's compensation carrier, didn't he, on November 18, 1948, when he came out to your residence?

A. That was quite a while ago and I was under stress. I didn't——

The Court: All he is asking you at the present time is if you remember the conversation. He is not asking you about details. Do you remember talking to this gentleman who has been referred to as representing Mr. Selby's compensation carrier?

The Witness: Now that Mr. Callaway has mentioned his name, I recall speaking to him.

(Testimony of William J. Byrne.)

The Court: All right. That is a good start. Now, follow from there.

Q. (By Mr. Callaway): Do you remember stating to him in words, substance, or effect that Mr. Leewenkamp gave you the device and that you and Mac installed it?

A. That Mac that you refer to—I was mixed up on Mr. Chirby's first name. I was under the impression it was Mac, but it was Mike.

Q. Regardless of who Mac is, do you remember, in stating to him in words, substance, or effect, that you and Mac installed the device on the spindle?

A. I don't remember.

Q. This is the first time that you had ever seen this [106] particular brand of cutter, is it not? I mean this one was the first one you had ever seen?

A. Will you explain that again, please?

Q. You had never seen a cutter of this make before you saw this one, had you (indicating)?

A. I had seen them of this type. I don't know whether it was the same brand or trade-mark or not.

Q. Now, at Selby's the only cutter that cut the bottom and the top at the same time they had was this one, isn't that right?

A. Yes.

Q. All the rest of them were cutters that would only cut one surface at a time?

A. Yes, sir.

Q. Now, the first experience that you had had with a shaper had been during your employment at Selby's?

A. I had run several of the smaller type before.

Q. You didn't have any shapers over at Glen-

(Testimony of William J. Byrne.)

dale, did you?

A. Before I never—my rating wasn't a millman, but I had run them.

Q. You mean just to see how they operated?

A. Yes.

Q. So, during the five weeks' period that you had been at Selby's, before the incident in question, you had operated [107] the single-surface cutters?

A. Yes, sir.

Q. But you didn't put that entire five weeks in operating even the single-surface cutters, did you?

A. Most of the time, yes, sir.

Q. You were not doing other things, such as joining——

A. When my material ran out I would go and help on another job.

Q. All right. Is that your initials on the first page, and the second, third and fourth (indicating)?

A. Yes, sir.

Mr. Callaway: I offer this in evidence.

Mr. Olson: No objection.

The Court: It may be received.

The Clerk: Defendant's Exhibit A in evidence.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

Q. (By Mr. Callaway): You probably have already answered this: You didn't make any adjustment on the blades during the time that you operated it?

(Testimony of William J. Byrne.)

A. I did not adjust the blades. I checked the top nut for tightness, and the guards.

Q. All right. Now, were any other cutters received at the same time that this one was received?

A. That I do not know, sir.

Q. Let me read to you from this statement:

"On 10-25-48 as far as I know, the company got in some new cutters for the shaper. Mack and myself put these cutters on the 26th. They slip over the shaft and are then bolted. They are standard mill equipment. They only got one of that particular type. When we installed them they fit o.k. After I ran the machine with the cutters it ran o.k. and did the job o.k. I had no occasion to take them off. It is customary to check them three or four times a day and each time I checked them they were o.k. These blades are fastened on an arm. There are six arms. Three on top and three on the bottom. What we installed were the complete blade and arm assemblies. That's the way the blades came. When we got them they were in a box and packed and Mr. Leewenkamp got the box. I saw him with the box, and either he or someone else unpacked them and when he gave me the blade assemblies I could see they were new parts. Just looking at them I couldn't see anything wrong with them with the naked eye. No defect could be seen."

Now, did you put your foot on the emergency before you bent down to the floor?

(Testimony of William J. Byrne.)

A. At the same time.

Q. I see. Simultaneously, in other words? [109]

A. Yes.

Q. And at the time you did that, simultaneously putting your foot on the emergency and bending down, you knew something was going to happen, didn't you? A. Yes, sir.

Q. And the reason you knew something was going to happen, Mr. Byrne, was because something had struck this arm, isn't that right?

Mr. Olson: Which arm?

Q. (By Mr. Callaway): Isn't that right?

A. I don't believe I understand you. There was wood going through.

Q. Yes. A. Going through the machine.

Q. Were there any spikes in the wood that you saw? A. No, sir.

Q. You were supposed to look for spikes?

A. In each board before it went through.

Q. And not put it through if there were any spikes in it that you could see?

A. That is right.

Q. Now, you were not conscious of any object striking you, were you? A. No, sir.

Q. The first thing you knew was that after an elapse [110] of two or three minutes you looked down and saw your hand was bleeding, isn't that true? A. Yes, sir.

Q. Now, as a matter of fact, the cast on your hand was removed on November 27th, was it not, rather than a week before Christmas?

(Testimony of William J. Byrne.)

A. I don't recall the exact date, sir. I thought it was close to Christmas.

Q. Who sent you to see Dr. Boyes?

A. My attorney called the insurance company and asked them if they would permit me, or recommend a hand specialist to look at my hand.

Q. You mean Mr. Selby's insurance company?

A. Yes.

Q. Who sent you to see Dr. Sutherland?

A. I went there on my own. I had known of him and knew he was a hand specialist.

Q. Did he give you any treatment?

A. No, sir.

Q. Just went there for an examination?

A. Yes, sir.

Q. Did anyone at the Selby plant there give you any instructions as to the use of this particular cutting device?

A. No, sir, they didn't need to.

Q. Now, other than the little click that you said you [111] heard, did you hear any other noises in connection with the operation of that machine?

A. No, sir.

Q. As you feed the wood into the machine you have your left hand on the guard and you feed the wood in with your right, is that right?

A. I can demonstrate with the board.

Q. All right.

A. Your spindle with your blades are setting on the table, and this is up against your back guard,

(Testimony of William J. Byrne.)

which has a hole here (indicating) for the blade to come through, with your top guard coming over and pressing on this, so that it will not raise or tip indicating). You shove it through at a medium speed, like that (indicating).

Q. And the guards you are talking about that fit over the top of the wood are the same as shown in Plaintiff's Exhibit 3? A. Yes, sir.

Q. Those are fixed in the position or tightened by screws that are attached to these members back here, is that right (indicating)?

A. Yes, sir.

Q. So that by the adjustment, loosening of those screws, the guards can be either pulled out or pushed in, in keeping with the width of the wood that you are surfacing? [112]

A. This screw affair on the top has a pressure on there which it is very unlikely they would—

A. No. My question was very simple.

A. Yes.

Q. Did you regulate them that morning for the purpose of fitting the width of panel that you were surfacing?

A. I checked it for pressure, to see whether or not it was too tight or too loose, in running the board through; and they were correct.

Q. When you first started using this machine, the day before, did you regulate those guards as to how far they came out from the standards they fit into?

(Testimony of William J. Byrne.)

A. That is done before the machine is turned on and before——

Q. Did you do it? I am asking you that, Mr. Byrne. A. No, sir.

Q. Who did it? A. Mr. Chirby.

Mr. Callaway: I think that is all, your Honor.

The Court: Do you have any redirect examination, Mr. Olson?

Mr. Olson: Yes, your Honor. [113]

Redirect Examination

By Mr. Olson:

Q. Mr. Byrne, Mr. Callaway asked you the question as to exactly what struck that arm. Your answer was that you did not know. Are you of the opinion that something struck that arm?

Mr. Callaway: I object to that as calling for a conclusion of the witness.

The Court: The objection is sustained.

Mr. Olson: So did the question call for a conclusion of the witness.

The Court: Well, he was cross-examining. You cannot cross-examine your own witness.

Mr. Olson: I don't mean to cross-examine him. I want him to explain that answer.

The Court: No.

Q. (By Mr. Olson): In your opinion did anything strike the arm that broke?

Mr. Callaway: I object to that.

(Testimony of William J. Byrne.)

The Court: I will sustain the objection. He is not to give an opinion. He is not an expert. He can tell what occurred, but not give his opinion.

Mr. Olson: May I ask him did anything strike that arm——

The Court: No, you cannot ask leading questions. You can ask him if he knows what struck the arm. [114]

Q. (By Mr. Olson): Do you know what struck the arm?

The Court: I would like to find that out from you yourself, Mr. Byrne.

The Witness: I do not know, your Honor.

The Court: You do not know?

The Witness: No.

Q. (By Mr. Olson): Do you know whether anything struck the arm? A. No, sir.

The Court: As a matter of fact, you were not conscious of the injury to your hand until you began raising yourself up?

The Witness: That is right.

The Court: For all you know, you may have cut your hand on something under the table?

The Witness: There was nothing under the table, your Honor, that could have cut me.

The Court: Was there any blood around. Did you observe whether there was any blood around the cutter that would indicate you were cut while you were operating on top of the table?

The Witness: No, there wasn't any blood or

(Testimony of William J. Byrne.)

anything to indicate it before the machine broke.

The Court: When did you first see the blood, right after you got up, and was it on the floor?

The Witness: After I got up there was blood on the floor.

The Court: Was there a trickle of blood from the table on which you were operating the machine to the place where you stooped?

The Witness: In the excitement I couldn't tell you, your Honor.

The Court: I do not blame you. You were hurt pretty badly. We are just trying to find out what you do remember.

The Witness: As soon as I hit the floor, and I waited, when I got up, why——

The Court: Can you give us an idea of the lapse of time between the time you were hurt, when you heard the—what did you call it, a noise?

The Witness: A click, a sort of a click.

The Court: ——you heard the click and the time you felt any sensation of injury to your hand or numbness? I asked you a question before and you said something about your hand feeling numb.

The Witness: Yes, it was. In other words, it was more or less paralyzed. I moved my left hand before the right.

The Court: Give me first the lapse of time, if you can tell.

The Witness: Approximately, maybe a minute, a minute and a half. [116]

(Testimony of William J. Byrne.)

The Court: That feeling came to you as you were already stooped, or did it come before?

The Witness: The numbness?

The Court: Yes.

The Witness: I didn't notice it until I got up on my feet.

The Court: You were not aware of any sensation of pain or numbness before you had actually stooped under the table?

The Witness: No, sir. There was quite a bit of noise, and so forth.

The Court: I understand that.

The Witness: I may have felt it. In my opinion I don't believe I did.

The Court: You do not remember.

The Witness: No.

The Court: You do not remember the feeling?

The Witness: No.

The Court: So you are sure, however, that it was not simultaneous? There was a lapse of time between your hearing the click and your feeling any sensation of having numbness or hurting in your hand? That feeling was after you had already stooped down, is that correct?

The Witness: Yes, sir. When something that fast hits you, you don't—

The Court: On direct examination you said something about [117] that fact that the reason you ducked, as it were, was sort of instinctive, that you were trying to avoid things flying in all directions? Is that what you said?

(Testimony of William J. Byrne.)

The Witness: Yes.

The Court: Do you remember anything actually flying in all directions before you stooped, or was it that you just did it instinctively, unconsciously?

The Witness: I remember as my head got below the tabletop things flying across my head and coming down.

The Court: Before you ducked or stooped down you do not remember seeing anything?

The Witness: No, sir.

The Court: I will put it this way: Did anything else accompany this click that you heard, such as scattering of things?

The Witness: Not until after I was under the table.

The Court: Do you remember what portion of your hands were on the board?

The Witness: Yes, your Honor.

The Court: That is, when you heard the click?

The Witness: I was running the board through the shaper in this manner (indicating), and I heard the click and I just went down. This hand was the last to go down because it was the furthest away (indicating).

The Court: Did your hands slide off the board or did you [118] take them off quickly?

The Witness: I guess they were knocked off by whatever broke the board that I was running.

Mr. Olson: Your Honor, I am not trying to be dramatic here, but with your permission I would

(Testimony of William J. Byrne.)

like to ask Mr. Byrne to give me his estimation of a minute.

He testified to a minute or a minute and a half. Most people, I find, don't know what a minute means.

The Court: Ask him what he means.

Q. (By Mr. Olson): Do not look at that clock, but look over there (indicating). I am going to start, and when I say, "Now" you start, and when you think a minute has elapsed you let me know. Now. A. Oh, about now.

Q. Mr. Byrne, that was $121\frac{1}{2}$ seconds. Now, would you tell me this: You just had $121\frac{1}{2}$ seconds period of time elapse. Is it your testimony that it took that long for you to discover that your hand was hurt?

Mr. Callaway: Just a moment, your Honor. That is argumentative.

The Court: That is argumentative. I will not allow that.

Q. (By Mr. Olson): Did it take that long for you to know your hand was hurt? A. No.

Q. You felt a numb sensation in your arm before you got up from the floor?

A. When I got up on my feet.

Q. About that period of time that you just figured, is that right?

A. Well, I said roughly a minute, because I couldn't get up—under the table and up again in 12 seconds.

Q. In the time that elapsed you couldn't get up

(Testimony of William J. Byrne.)

again? A. In the time you checked me on.

The Court: You are absolutely certain that you felt no numbness or sensation until after the lapse of that period of time, whatever you call it?

The Witness: Yes, your Honor.

The Court: All right.

Q. (By Mr. Olson): Have you ever had a prior injury to your right hand, before this accident?

A. No, sir.

Q. Of any kind or nature? A. No, sir.

Q. Who wrote this statement for you that Mr. Callaway has put in evidence? Did you write it? Is this your handwriting (indicating)?

A. I don't believe I could write at that time.

Q. Is that your handwriting? A. No.

Q. It is not your handwriting? A. No.

Q. Do you know whether Mr. Taylor wrote it for you? A. I believe it was him.

Q. You testified on cross-examination that when you put your foot on the emergency brake that you knew something was going to happen. Do you mean by that something was going to happen or had happened?

A. When I heard the click I knew something was going to happen; how soon I didn't know.

Q. You dropped and put your foot on the brake?

A. That is correct.

Q. Is it your testimony that your right hand was the last part of your body to leave the surface of the machine? A. Yes, sir.

Q. Because that was the furthest part of your

(Testimony of William J. Byrne.)

body? A. Yes.

Q. That part of your body was furthest away?

A. Yes.

Q. As depicted in this picture of this man running this shaper? A. Yes.

Q. I didn't understand your answer, Mr. Byrne, when you testified on cross-examination, other than the little click you heard no other noises in connection with the machine. [121] By that answer do you mean that the plant was quiet, that you could hear a pin drop?

A. Do you mean if I heard other machines going?

Q. That is what I want to know. The way you testified on cross-examination there was not another sound except that little click you heard. Did you hear any other noise in connection with the machine was the question, and your answer was no.

The Court: No. You did not understand the question.

The Witness: I meant referring to that machine.

The Court: He meant in connection with that machine.

Q. (By Mr. Olson): That was the only unusual noise you heard, is that what you mean to say?

A. Yes.

Mr. Olson: At this time, your honor, I would like for the jury to see Mr. Byrne's hand.

The Court: He can pass in front of the jury and show them his hand. Mr. Byrne, do not make any remarks.

(Testimony of William J. Byrne.)

The Witness: Yes, sir.

Mr. Olson: That is all.

Recross-Examination

By Mr. Callaway:

Q. At the time that this happened you were in the act of putting a board through this machine, is that right?

A. It was——

Q. At the time you went down under the table you were in the act of feeding a board to the machine?

A. That is correct.

Q. So you left the board, I take it, in the machine when you went down, you dropped it and turned loose of it?

A. When I left the table, yes.

Q. Yes. What happened to the board, did you see?

A. I couldn't tell. It happened so fast I didn't know whether the board flew out endways or up or down.

The Court: As a matter of fact, you do not know what cut your hand?

The Witness: That is right, your Honor.

The Court: There was no evidence there of blood to indicate what did it?

The Witness: Only where I picked my hand up off the board.

The Court: All right.

Mr. Callaway: I have no further questions.

(Testimony of William J. Byrne.)

Redirect Examination

By Mr. Olson:

Q. Your hand wasn't cut 10 seconds before the part disintegrated?

A. No. The board was perfectly clear of all marks.

Q. I didn't ask you that. I said, your hand was not [123] cut just before the accident? A. No.

Q. It was cut after the accident?

Mr. Olson: That is all.

Mr. Callaway: That is all.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Olson: Mr. Cheney.

GOUGH L. CHENEY

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Gough L. Cheney.

Direct Examination

By Mr. Olson:

Q. What is your occupation, Mr. Cheney?

A. Chemist and engineer.

Q. Are you employed? A. I am.

(Testimony of Gough L. Cheney.)

Q. By whom? A. Smith-Emery Company.

Q. What is that company, what business is that company [124] in?

A. They are chemists and engineers.

Q. How long have you been employed there?

A. Since 1915.

Q. How long have you been a chemist, Mr. Cheney? A. Since 1910.

Q. You are now a chemical engineer?

A. Yes, I am a registered chemical engineer in the State of California.

Q. Have you specialized in any phase of your profession?

A. Not exactly specialized but practically all branches of chemical engineering.

Q. Did you ever have occasion to make an examination of a certain panel raiser head at my request? A. I did.

Q. Is this head that is before you the panel raiser head I asked you to examine and you did examine? A. Yes, it is.

Q. How do you identify it that it is the same one? A. That is the same one.

Q. I will ask you, referring to Plaintiff's Exhibits 2-A, -B, -C and -D, if you also used these parts of the panel head in your examination?

A. I did. [125]

Q. Did you render me a report, based upon the examination made by you, which report is dated November 4, 1949? A. I did.

(Testimony of Gough L. Cheney.)

Q. Is this the seal of the Smith-Emery Company and the signature of Smith-Emery (indicating)?

A. It is.

Q. That is your report? A. Yes.

Q. The original? A. Yes, sir.

Mr. Olson: I will offer this in evidence as Plaintiff's next in order.

Mr. Callaway: Your Honor, I don't think so. The witness is here.

The Court: I do not think so, either. You cannot use a report. He is right here to testify in person.

Mr. Olson: I don't necessarily have to. I can just give it to him to refresh his mind.

The Court: He is presumed to know what he wrote there.

Mr. Olson: I would rather he would testify, anyway.

Q. (By Mr. Olson): You can have that to refresh your memory, Mr. Cheney.

When was this examination made by you?

A. Last fall—maybe it was the early summer. I would have to refresh my memory as to the date of receipt. That [126] was received on June 6th—I mean June 2, 1949, so the work was done within a month or two after that.

Q. How long did it take you to do the work you did in analyzing that part?

A. Probably a lapse of a couple of months.

Q. Where was this examination made by you?

(Testimony of Gough L. Cheney.)

A. Smith-Emery Company's laboratory.

Q. Before you made this examination did you obtain the information regarding the circumstances surrounding the necessity of having it made?

A. Yes. I was told certain circumstances that were involved in this situation.

Q. Were you informed it had broken?

A. Yes, sir.

Q. When you examined that part did you find any evidence that a previous examination had been rendered?

A. In my opinion there had been on the broken arm.

Q. What led you to that conclusion?

Mr. Callaway: I object to that as being immaterial.

Mr. Olson: I don't think so.

Mr. Callaway: It is immaterial, how many times it has been examined.

The Court: I do not think that is material.

Mr. Olson: The part has been affected by the prior examination. [127]

The Court: If there has been any change——

Mr. Olson: There has been.

The Court: ——in the structure, that is different.

Mr. Olson: Yes. That is the purpose of my question.

The Court: All right.

Q. (By Mr. Olson): What made you determine there had been a prior examination?

(Testimony of Gough L. Cheney.)

A. In my opinion there has been a sample taken out of this broken arm.

Q. By "broken arm" you are referring to Plaintiff's Exhibit 2-A? A. That is correct.

Q. You refer to this hole in the back of the cutter (indicating)? A. That is right.

Q. In your opinion that was done purposely by someone making a prior examination?

A. It is my opinion it was.

Q. What methods were used by you in making this examination? Can you describe them as best you can, so that the ladies and gentlemen of the jury and all of us can understand?

A. Of course, first I made a visual examination to find out what I could, just by close inspection.

Then I took samples from both members for chemical [128] analysis, to determine the type of metal used.

Then I cut specimens from the broken arm at the face of the fracture, in order to determine if I could the character and appearance and structure of the metal at the fracture.

Q. Now, you say you cut the metal. I will ask you if the two pieces designated as Plaintiff's Exhibits 2-C and 2-D are the parts, are the pieces you cut? A. That is right.

Q. If they were put together they would make the rest of the arm, is that correct?

A. With the exception of the small amount of metal removed by the saw.

(Testimony of Gough L. Cheney.)

Q. By the saw. Did you take any photographs of the cutter? A. I did.

Q. On the basis of your examination of this cutter and your chemical analysis, did you form an opinion as to the cause of the upper arm of the panel raiser head breaking, the one that was broken?

Mr. Callaway: Just a moment. I submit no proper foundation has been laid for the answering of that question, and it invades the province of the jury. Even an expert is limited. He can tell what he found on the strength of the arms and all those things, but to express a conclusion as to what caused that arm to break I think is far beyond the [129] province of a chemist. It invades the province of the jury.

Mr. Olson: Just his opinion as an expert.

The Court: In the Federal Courts experts are very limited in their scope. Even a doctor, for instance, in cases involving total and permanent disability can say a man cannot work, but he cannot say a man is totally disabled.

This man can give his opinion as to what he found, but to ask him the question in the form in which you have asked it is to invade the province of the jury. If he found structural defects and the like, he can describe them, he can tell about them. He can tell what he found. It may have the same result, in the last analysis, as a direct question. You are not allowed to ask the direct question. That was settled long before I came on this bench

(Testimony of Gough L. Cheney.)

in the famous case known as *Stephens v. United States*, 73 Fed. (2d) 695, which involved the question of doctors' testimony.

Mr. Olson: I will strike the question.

The Court: I know in the State Courts they are allowed greater latitude. We are not bound by the rules as to experts in the State Courts.

Mr. Olson: I will take your Honor's suggestion.

Q. (By Mr. Olson): I will ask you if, on the basis of your examination, you found any structural defects on this arm, this panel raiser head? [130]

A. Yes.

Q. Describe them.

A. The defects which I could see after the arm broke on the upper member, there were a series of shrinkage cracks or blow-holes or imperfections in the metal. Those apparently reached the inner surface of the arm, so that they were visible from the exterior surface.

There are also some minor porosities visible on the machined surface of the upper arm. Those are the most outstanding things that can be seen on the arm.

The Court: That conclusion you arrived at from the visual examination?

The Witness: Visual examination plus microscopic examination of specimens obtained from the other fractured surface of the arm.

The Court: You did not give them any tensile tests?

The Witness: No, sir.

(Testimony of Gough L. Cheney.)

The Court: To see if they would stand a certain pressure and stress?

The Witness: No, I did not, because the amount of metal remaining in the broken arm is entirely too small for such tests, and also examination of the cutter shows that the arm adjacent to the broken arm has been bent back through an angle of approximately 35 degrees, so that that particular arm, at any rate, the metal was ductile enough it did not break on being bent back over that angle.

The Court: All right.

Q. (By Mr. Olson): Did you, in your examination, find any evidence that the arm which broke had struck a hard or metallic object before breaking?

A. In my opinion, I can't see anything on that broken arm to indicate it would have struck anything hard enough to break that off.

Q. Did you observe in your examination that the arm behind the broken arm is bent back?

A. Yes, sir.

Q. Did you form any opinion as to how that occurred? A. I did.

Q. Will you explain what your——

Mr. Callaway: Just a minute. That calls for speculation and surmise, as to how that occurred, without further foundation being laid, even from an expert.

The Court: That is an explanation of a physical condition that was found. That is in the realm of expert testimony.

(Testimony of Gough L. Cheney.)

Mr. Callaway: As to how it was bent back?

Mr. Olson: Yes.

The Court: Yes.

Q. (By Mr. Olson): Go ahead.

A. From examination of the tool which was attached to [132] the bent arm there is a piece broken out of the front of that cutter and there are also two marks on the under side which conform to the threads on one of the bolts in the broken arm, indicating to me that this arm went back and struck this part of the cutter, bending this arm back and breaking off this end of the cutter (indicating).

Q. On the second arm?

A. On the second arm.

Q. Do you have an enlarged photograph in your report of the screw marks on the broken blade of the bent cutter which you say was struck by the screws on the cutter that broke off?

A. I have.

Q. Will you show me that?

A. Yes. Here it is (indicating).

Q. As I understand this photograph, and so the jury can understand this photograph, this represents the blade of the cutter of this one that bent back; the one behind it, it fits in?

A. It fits in here and it is broken off (indicating)

Mr. Olson: May I show the jury this picture?

Mr. Callaway: You can offer it in evidence.

Mr. Olson: I tried to.

(Testimony of Gough L. Cheney.)

Mr. Callaway: Not the report.

Mr. Olson: I will offer this photograph in evidence. [133]

The Court: Detach it from the report.

Mr. Olson: I will offer all the photographs.

Mr. Callaway: I have no objection if the witness will identify what they are.

Mr. Olson: All right. I offer them all now.

Q. (By Mr. Olson): What does photograph No. 1 represent?

A. That shows the general appearance of the cutter as it was received by me, and also the fractured surface on the arm and blow-hole.

Q. By the way, is this blown up in any way, or is it the actual size.

A. No, it is slightly enlarged.

Q. Will you identify what is represented by photograph No. 2?

A. That is an enlarged photograph of the fractured surface, showing the large shrinkage cavity or blow-hole.

Q. No. 3 represents what?

A. It is the broken tool on the adjacent arm and the bolt which had the threads distorted from the broken arm.

Q. Photograph No. 4?

A. That shows the——

Q. Excuse me. It is designated "Photomicrograph No. 1."

A. Photomicrograph taken at 100 diameters, to

(Testimony of Gough L. Cheney.)

show inclusion and porosity in the metal at the fracture.

Q. In other words, photomicrograph No. 1 is a sample [134] of the metal at the point of fracture, at the blow-hole? A. Yes.

Q. And No. 2?

A. That is after action, to bring out the grain structure of the metal.

The Court: Is that porosity noticeable on any other portion of the structure, except the broken place?

The Witness: The greatest amount is in the vicinity of this fractured surface. There are also others to a lesser extent, which are visible on the bent arm. Even on the machined upper surface you can see where the small blow-holes or pockets existed in the metal. The other arm seems to be quite sound, so far as the visual inspection goes.

Q. (By Mr. Olson): Now, again, so the jury will understand that photograph, where the screw is shown, that shows where the screw of the broken arm fits into the blade of the arm behind the broken arm. Did you find the alignment——

A. They seemed to match exactly. In taking a photograph they were removed from the broken arm, so they could be put in position.

Q. What does that signify to you?

A. That that bolt was what hit that tool.

Q. In other words, that the part that broke, broke first, and it hit the blade behind the part that

(Testimony of Gough L. Cheney.)

broke? A. That is my opinion, yes. [135]

Q. Did you find any evidence that the part that broke, the arm that broke, the blade that broke, had struck any object before it broke?

A. I don't see any evidence, in my opinion. There are a few little marks on it. They don't appear to me to have been there before this thing was flying around and hitting all kinds of things.

Q. Is this the blade from the broken part (indicating)? A. It is.

Q. Did you find any marks on it, to indicate it had struck any object of any kind, a spike, or anything?

A. Yes, there are a few little marks on the cutter blade, but quite small. Under the microscope they seemed to have, in my opinion, to have come from the back side, rather than the front side.

Q. Which would have occurred when?

A. Probably after it was broke and flying around and hitting all this other metal.

The Clerk: Your Honor, are these photographs admitted in evidence?

The Court: They may be received.

The Clerk: Plaintiff's Exhibits 6, 7, 8 and 9 in evidence.

(The photographs referred to were marked Plaintiff's Exhibits 6, 7, 8 and 9, respectively, and were received in evidence.) [136]

Q. (By Mr. Olson): From your examination of this panel raiser head, did you make any determina-

(Testimony of Gough L. Cheney.)

tions of what the original position of the cutters was before the accident?

A. I made an examination to determine whether there was any evidence that the upper member had moved.

Q. Was there any evidence that the upper member had moved? A. There was.

Q. What was that evidence?

A. Well, looking with a magnifying glass down through this little key slot, with the adjacent hole, it looks like the metal was rolled up and gouged out, pulled away from the keyhole. On removing the Allen nuts the bottom of them showed they had been dragged across the surface of the shaft.

Q. In other words, in layman's language, as I understand you, from the indications you have just described, it is your opinion that when this broke the top cutter turned as far as it did away from where the pins should have been?

A. Yes. Without having removed it—I couldn't see, but the evidence is it moved the distance from this hole (indicating), where this hole is now, to the key slot. And also that distance is the same as the Allen screws are displaced from the flat——

The Court: What, in your opinion, caused that

The Witness: When the broken cutter hit this arm with such force to bend that arm back through about 35 degrees.

The Court: That is what caused it?

(Testimony of Gough L. Cheney.)

The Witness: That is my opinion, yes, sir.

The Court: All right.

Q. (By Mr. Olson): Did you find any evidence of an abnormal condition of operation prior to this arm breaking?

A. I see no evidence, myself. I could attribute that to such a thing.

Q. There is no evidence of any abnormal operation?
A. No, sir.

Q. Did you find any evidence of any abnormal installation?

A. Nothing that is visible to me, with what I have before me.

Q. Did you compare the chemical composition—by the way, what is that cutter, the part where it broke? What is it, what material is it made of?

A. Examination of and analysis indicates cast steel.

Q. It is of cast steel?
A. Yes.

Q. Any alloys in it?

A. I couldn't find any.

Q. What is the significance of an alloy in steel?

A. Well, there are two types of steel, the plain carbon [138] steel and there is an alloy steel.

Q. This is a carbon steel?

A. Plain carbon steel.

Q. Which is stronger?

A. As a rule the alloys are added to give greater strength to steel.

Q. You found no alloys at that place of break?

(Testimony of Gough L. Cheney.)

A. No.

Q. Did you find any alloys anywhere in it?

A. No, I did not.

Q. You compared the chemical composition of that arm which broke at the point of break?

A. I would have to refresh my memory.

Q. I will ask you, did you compare the chemical composition of this steel, cast steel, with the chemical composition of the lower arm?

A. I did.

Q. What was that? What did you determine from that comparison as to the chemical composition in both arms?

A. I would have to refer to my notes.

Q. Go ahead. There it is (indicating).

A. The analysis of the upper, the cutter arm or the upper member, from samples taken right in the vicinity of this porosity or blow-holes, right close to the fractured surface showed carbon .24 per cent, manganese .55 per cent, [139] phosphorus .72 per cent, sulphur .067 per cent, silicon .23 per cent.

Then samples were drilled in the lower member, in one of the arms immediately below this other one, and gave the following analysis: carbon .24 per cent, manganese .52 per cent, phosphorus .039 per cent, sulphur .042 per cent, silicon .31 per cent.

Q. I don't know as the jury remembers those figures as given. The upper cut or the broken part, the part we are complaining about, had the same amount of carbon?

(Testimony of Gough L. Cheney.)

A. It had .55 per cent manganese as against .52 for the lower arm.

The Court: You can argue that when the case goes before the jury.

Q. (By Mr. Olson): I will ask you this—

The Court: If you want to put it on a black-board, if you want the jury to see it, you can do that tonight and they can see it tomorrow. You can show the difference in figures tomorrow when you argue the case.

Mr. Olson: Strike that.

Q. (By Mr. Olson): What is the purpose of manganese, phosphorus, sulphur, silicon? What is the effect of that on cast steel?

A. All steel has more or less manganese in it, but steel normally only contains a maximum of about .05 phosphorus [140] and .05 sulphur, or less. When the sulphur and phosphorus gets higher than that it is usually considered to be out of standard specifications.

Q. What is S. A. E. steel?

A. Society of Automotive Engineers.

Q. Is that a standard for steels?

A. Yes, it is a grading.

Q. Did you find in your analysis which you just read that the cast steel at the point of the break there was S. A. E. steel?

A. No, because the phosphorus and sulphur are out of the required limit.

Q. Was the lower arm S. A. E. steel?

(Testimony of Gough L. Cheney.)

A. No, sir; it is O. K.

Q. What is the effect on cast steel of phosphorus and sulphur? A. It could make it brittle.

Q. Now, where did you find the weakest point of this panel raiser head arm to be?

A. Mechanically the point that would take the greatest load is right where it broke.

Q. Where it broke. What point, if any, on the portion of where it broke would take the greatest stress?

A. Approximately at the fractured surface. That is the greatest leverage. [141]

Q. Where the blow-hole is? A. Yes, sir.

Q. Did you measure the depth of the blow-hole?

A. No. It is about half an inch deep.

Q. In answer to some of the questions by the court I think maybe you answered this, but I want to ask it again: In you opinion were those blow-holes and the excessive porosity in that cast steel discernible to the naked eye before the arm broke?

A. Yes, I think fairly careful inspection would have shown them.

Q. And not even necessarily tests?

A. Yes. I think those cavities in the broken arm could have been seen.

Q. With the naked eye? A. Yes.

Q. Without a microscope? A. Yes.

Q. Was that casting painted after it was milled?

A. It is painted. I don't know when.

Q. It couldn't be painted and then milled? It is painted, is it not? A. It is painted.

(Testimony of Gough L. Cheney.)

Q. In your opinion were the blow-holes and excess porosity in that arm more discernible or less discernible [142] after it was painted or before it was painted?

A. The paint filled up some of the porosity.

Q. In other words, while it was being machined and not painted the blow-holes would be more apparent to the naked eye than they are now?

A. In my opinion.

Mr. Callaway: That is argumentative.

Q. (By Mr. Olson): I am just asking is that a fact?

A. Yes, I think they would be more apparent.

Q. Would you point out to the jury where those blow-holes and where that porosity is apparent to the naked eye?

A. Well, examination of this broken arm in the vicinity of the fractured face, you can see these blow-holes are where they come to the surface on the inner side. There are none apparent on the outer side. But then over on the arm, over here (indicating), that is bent. You can see them on the machined surface as well as down here in this bend (indicating).

Those blow-holes here on the inner surface have, in my opinion, weakened the metal at that point, just the same as if you nicked a piece of metal or wood and then bent it in that direction (indicating). The same way as when you cut a selvage of cloth, and tear it, it tears easier after that has been done.

(Testimony of Gough L. Cheney.)

In other words, it is my opinion if those blow-holes had [143] been on the outside they wouldn't have near the effect they had on the inside.

Q. In your examination did you find that the arm broke off sharp or that it bent?

A. The broken arm seems to be quite a sharp fracture.

Q. Like that (indicating)? A. Yes, sir.

Q. Did you find that the arm that was struck with the piece at the broken part bent?

A. Yes, it bent quite a bit.

Q. Did you form an opinion as to the effect of the blow-hole at the point of break, that is, what percentage it weakened that particular arm?

A. I figured out approximately the amount of area that was occupied by the blow-holes and porosity.

Q. What was your finding?

A. I would have to refresh my memory.

Q. You may?

A. All told approximately 17 per cent of the area of the fracture consisted of porosity, blow-holes.

Q. Which would weaken after 17 per cent?

A. It might be considered that way, but the position of the blow-holes is much more important than the average area—relative area.

Q. What was that position? How important was the [144] position of that blow-hole and that porosity to the strength of that arm?

A. I think the porosity on the inner side of

(Testimony of Gough L. Cheney.)

that casting in there was very important. Just as I say, if the force went in that direction it would make it tear and break easier.

Q. Let me ask you a question, Mr. Cheney, which might seem a little simple: Blow-holes in cast steel tend to make it weaker?

A. It is just that much less metal. I would say it would make it weaker.

Q. In other words, you would say that any blow-hole will weaken the metal?

A. Oh, well, just in that proportion it is the same.

Q. In proportion to the number and size?

A. The same as the actual metal that exists.

Q. Is cast steel apt to segregate when it is cast?

A. It often occurs, yes, sir.

Q. What does segregation in steel do to the steel?

A. It forms a condition like we have here in this broken arm (indicating).

Q. Would you say, then, there is segregation in that casting?

A. There is right at that point.

Q. It was visible to the naked eye? [145]

A. After it broke, yes.

Q. What do you chemists mean when you say, "locked-in stresses"?

A. Internal stresses that exist in the metal that haven't been relieved, so that it can't support the load it might have if the stresses had been relieved.

(Testimony of Gough L. Cheney.)

Q. Is there a method of relieving locked-in stresses?

A. Yes. Castings are usually annealed.

Q. What do you mean by "annealed"?

A. Heated up to the point that those stresses are dissipated.

Q. In your opinion were any internal or locked-in stresses completely relieved in the raiser head, based on your examination?

A. At that point where the fracture occurred the structure indicates that the casting was not completely annealed.

Q. What tests are there to determine whether blow-holes or porosity exist in a cast steel, other than if it is visible to the naked eye?

A. Take an X-ray of it.

Q. Would that show porosity and blow-holes?

A. Yes, if they are large enough.

Q. What do they mean, or what do you mean by "large enough"?

A. Large enough so that they could be photographed. [146]

Q. In your opinion would an X-ray show that blow-hole?

A. Oh, it would show that big one easy.

Q. Easily? A. Yes.

Q. What do they mean by a microgram?

A. Just a picture taken through a microscope.

Q. Would that reveal blow-holes?

A. No, sir.

(Testimony of Gough L. Cheney.)

Q. Are there any other ways to determine the existence of blow-holes, porosity, segregation than X-ray?

Mr. Callaway: I object to that, if your Honor please, as being immaterial. The mere existence of other measures is not the test, in a case of this kind, as to what is reasonable inspection. No foundation has been laid for this witness to so testify.

The Court: He has already testified to some of it, and there was no objection.

Mr. Callaway: I didn't object to it.

The Court: I think in view of that fact I will allow the question to be answered.

However, I am going to tell the jury that the question of the existence of that does not necessarily mean that has to be followed in this case. The question is whether such reasonably should be followed by a manufacturer. In other words, a manufacturer is not required to take every piece of [147] steel he puts out and put it under an X-ray machine. It would make steel much more expensive than it is now.

It is for you to determine ultimately whether there was a failure to take such precautions and make such tests as a manufacturer ordinarily would follow, under these circumstances.

With that modification——

Mr. Olson: Will you add another modification?

The Court: What is that?

Mr. Olson: That the reasonability of the test is

(Testimony of Gough L. Cheney.)

also based upon the use to which the thing is to be put.

The Court: That is right. And it is to be determined by the jury as to whether it is reasonable in the particular case.

With those modifications, you may answer the question. The question is, are there other tests, other than the X-ray test you were speaking about?

The Witness: Yes, there are other tests, such as what they call magniflux. That is usually used on forgings and articles of that type, to show cracks which are too small to be visible to the naked eye.

I think a casting of this nature, to visually show by visual inspection, to show a surface porosity, or X-ray, would be the only ones I know of to be used without destroying the casting. [148]

Mr. Olson: I think that is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Callaway:

Q. Mr. Cheney, were you told when you were given these circumstances that this device was revolving at 7200 revolutions per minute?

A. I don't recall that I was told what the r.p.m. was they were using at the time.

Q. Well, let's assume that the arm in question was struck by a piece of wood. That wouldn't necessarily leave any physical evidence of its having been struck, would it?

(Testimony of Gough L. Cheney.)

A. No. I assume that was the purpose of the cutter, was to——

Q. I am not talking about the cutter. I am talking about the arm. A. The same.

Q. As a matter of fact, it is just as consistent that this arm struck some object and that the slipping around on the shaft took place, until the arm reached its tensile strength, and then it broke, isn't that right?

A. No, I don't agree with that, from my viewpoint, my opinion.

Q. All right. Now, you don't know which took place first, do you? [149]

A. I have an opinion.

The Court: Go ahead and give your opinion.

The Witness: The broken arm broke first.

Q. (By Mr. Callaway): All right. Now, it isn't unusual to find blow-holes in cast steel, is it?

A. No. It occurs quite frequently.

Q. As a matter of fact, you can hardly cast steel without creating some blow-holes, isn't that right?

A. It could happen.

Q. There is no such thing as perfectly annealed steel, is there? A. Relatively, there is.

Q. I mean actually.

The Court: The type used in the manufacturing of this kind of instrument.

The Witness: At the high speed a tool like this——

(Testimony of Gough L. Cheney.)

The Court: Yes. We are not talking about precision instruments which are manufactured of a different kind of steel. We are talking about this kind.

The Witness: The only way I could answer that is that a tool of this type that operates at that high speed shouldn't have any imperfections in it.

Mr. Callaway: I move to strike that answer.

The Court: That is a conclusion. I will strike it.

The question was whether porosity of that kind does not [150] occur in steel which is used for this type of instrument. This is a cast steel, is it not?

The Witness: Yes, sir.

The Court: It is not the precision instrument type which requires a special steel?

The Witness: It is not a forged steel.

The Court: That is right.

The Witness: I hardly know how to answer that. I have never seen a high-speed tool like that, that was broken from some other cause, that showed porosity.

The Court: I see. All right.

Q. (By Mr. Callaway): Well, we are talking about high-speed tools that are made to cut steel. This was made, you understand, to cut soft wood.

A. I mean high-speed of the r.p.m.—going around several thousand times a minute.

Mr. Callaway: That is all.

The Court: You exclude all possibility that that break may have been caused by some piece of wood coming in contact with the cutter?

(Testimony of Gough L. Cheney.)

The Witness: In my opinion, I don't see how a piece of wood could have struck that, because the whole arm is covered by the tool itself.

The Court: All right. Any redirect examination?

Mr. Olson: Yes. [151]

The Court: The cross-examination has been very limited. I am going to limit the redirect examination. Do not bring in any new matter.

Mr. Olson: The cross-examination went to the material in that casting and metal used in the casting.

Mr. Callaway: Not a word, except was it ordinary cast steel.

Redirect Examination

By Mr. Olson:

Q. In your opinion, is ordinary cast steel the proper steel to be used in instruments of this type?

Mr. Callaway: I object to that, no proper foundation having been laid.

The Court: The objection will be sustained. There is no showing a special kind of steel was ordered. You carry the doctrine beyond limits here. You make them guarantors. The courts have refused to do that.

The objection will be sustained on all possible grounds. This is not proper redirect examination.

Mr. Olson: I am not trying to be improper, your Honor.

(Testimony of Gough L. Cheney.)

The Court: I know. I am using the word in the ordinary sense. It is not material inquiry. It is not a subject which is germane to the issues here.

When I try to use an ordinary dictionary word you resent it. It shows how words become a pattern. We are used to [152] using the words "incompetent, irrelevant and immaterial." I do not mean you are asking improper questions. I mean a proper subject to inquire into.

Mr. Olson: I have no further questions.

The Court: All right.

Mr. Callaway: That is all.

The Court: Step down.

(Witness excused.)

The Court: Do you have any doctors here?

Mr. Olson: I certainly have.

The Court: We will put them on.

Mr. Olson: I have run out of witnesses.

The Court: I want to warn you, since this is the first time you have been here, to never do that. If you do, you are going to work Saturday. You are not in the Superior Court. You do not limit your witnesses here, or sometime you will find yourself in the position of where you cannot go on and I will ask the other side to go on. I control the hours in this court.

Mr. Olson: I understand, your Honor.

The Court: You should have had those witnesses here. We could easily put through one doctor. This

case has to be finished tomorrow, otherwise we will work Saturday morning.

Mr. Olson: I wanted to discuss that with you, your Honor, as to the doctors. The doctors are not available. [153]

The Court: The doctors will have to be here whether they are available or not. They will have to be here tomorrow morning at 10:00 o'clock. Doctors are subject to subpoenas, just like anyone else.

Mr. Olson: I will have one here at 10:00 o'clock tomorrow morning.

The Court: We try to accommodate them by putting them on out of turn, out of order. I will not stop the trial of the case to wait for a doctor.

Mr. Olson: I am not asking you to.

The Court: This case was set, and I gave you a definite day. I continued it to Thursday, with the understanding we would be through. I worked very long hours in the other case to finish.

I am not going to lose any time tomorrow. I am giving your warning—both sides—if the case is not finished tomorrow we will work Saturday.

Mr. Callaway: I understand.

The Court: Otherwise, we will have to go to Tuesday, and that is too long. If we finish the taking of testimony and the arguments I might change the technique and instruct the jury Monday. I will determine that later on. Do not make any week-end engagements.

Now, ladies and gentlemen of the jury, we are about to take an adjournment to tomorrow morning

at 10:00 o'clock. [154] You are admonished not to converse among yourselves or with anyone else on any subject connected with the trial, or to form or express an opinion thereon until the case is finally submitted to you.

You have heard only one side of this controversy, and you should keep your minds open, because you are not in a position to form any inference or any conclusion as to any fact in this case until all the evidence is in and you have been instructed by the court as to the legal principles which apply.

You will find this case involves a very, very technical problem of law, as to which you will have to be instructed very, very fully before you analyze the facts which are proven in this case. The defendant has not had his say as yet. There is testimony to be offered in their behalf, oral testimony, and I understand some depositions are going to be read. Until all the evidence is in, keep your minds open and do not form any conclusions as to the ultimate facts, as to whether the plaintiff is or is not entitled to recover, or as to any of the facts in the case.

When you return in the morning go to the jury room and we will call you when we are ready.

(Whereupon, at 5:20 o'clock p.m., Thursday, February 16, 1950, an adjournment was taken until 10:00 o'clock a.m., Friday, February 17, 1950.) [155]

Los Angeles, California,
Friday, February 17, 1950. 10:00 A.M.

The Clerk: No. 9134-Y, William J. Byrne v. Woodworkers Tool Works, a corporation, for further trial.

The Court: Let the record show the jury is in the box. Proceed.

Mr. Olson: With your Honor's permission, may I call Mr. Byrne to the stand for about two questions?

The Court: Yes.

WILLIAM J. BYRNE,

the plaintiff herein, recalled as a witness in his own behalf, having been previously sworn, testified further as follows:

Direct Examination

By Mr. Olson:

Q. Mr. Byrne, since your accident did you keep any records of your own making concerning medical bills paid or owed by you since this accident?

A. Yes, sir.

Q. Have you since yesterday's court session had occasion to refresh your memory with those notes?

A. Yes, sir.

Q. Will you tell us, to the best of your knowledge, what medical bills are now owed by you or have been paid in [157] your behalf to date?

Mr. Callaway: I object to that at this time on the ground no proper foundation has been laid. I as-

(Testimony of William J. Byrne.)

sume that the doctors are here and they are the ones to testify.

The Court: The amount he paid is one element. They can testify as to whether they were necessary. Overruled.

Q. (By Mr. Olson): Answer the question.

A. To the best of my recollection I owe between \$350.00 and \$400.00.

Q. Medical bills? A. Medical bills.

Q. Have you refreshed your recollection concerning the time you actually lost from employment as a result of this accident?

A. The time that I lost——

Q. Answer yes or no. A. Yes.

Q. Will you tell what that time is now?

A. It is eight months, almost eight months and a half.

Q. Do you know what your average weekly earnings were just before the accident?

A. My average weekly earnings were \$64.00.

Mr. Olson: That is all. [158]

Cross-Examination

By Mr. Callaway:

Q. Mr. Byrne, you returned to work on the 10th of January, 1949? A. Yes, sir.

Q. You worked to the 1st of February?

A. Yes, sir.

Q. As a helper? A. Yes, sir.

Q. At the same rate of pay? A. Yes, sir

(Testimony of William J. Byrne.)

Q. What you did during that period of time was to move things around, isn't that right? You didn't attempt to operate any machine?

A. No, sir.

Q. What was there about the duties of a helper that you couldn't perform during that period of time?

A. I was unable to lift the doors on and off of sanding tables. I was unable to hold——

Q. I am not talking about in connection with the operation of any machines. You weren't attempting to do that. I am talking about the work that you went back there to do as a general helper.

A. Well, it was moving doors and assisting people in moving objects like doors and door panels. [159]

Q. What was there about your condition that prevented you from doing that?

A. I had no grip in my hand. I was not able to hold any quantity in my hand, pieces of wood.

The Court: Do you have any more grip in your hand at this time than you did then?

The Witness: The doctor has not examined me lately.

The Court: I did not ask you that. I asked if you had any more grip now than you had then?

The Witness: Not very much, sir.

Q. (By Mr. Callaway): Is it your testimony that you can't pick up anything with that hand and lift it?

(Testimony of William J. Byrne.)

A. To a limited extent I can lift it, sir. I can lift a book.

Q. You have calluses on your hand, I notice. What do you do to get those?

A. Well, I have to do a certain amount of work in order to pay my living expenses.

Q. I didn't ask you that. I asked you what you did to get the calluses on your hand.

A. Oh, worked in my yard.

Q. Anything else?

A. Oh, occasionally I do something else. I will dig or something like that.

Q. Sir? [160] A. Occasionally I will dig.

Q. When you say work in your yard, do you mean with a rake and hoe and spade?

A. Yes, sir.

Q. What is there about this work of yours in tree surgery that you can't do?

A. In doing cavity work and so forth I am not able to use my hand in using a chisel or a hammer. I am not able to hold certain types of power equipment that is necessary in the work. I am not able to hold a rope in my hand.

Q. Now, actually, when did you go into the tree surgery business? A. About the 1st of July.

Q. What is it?

A. About the 1st of July, 1949.

Q. Did you spend any time between February 1st and July in training yourself for that?

A. No, sir.

(Testimony of William J. Byrne.)

Q. You hadn't ever had any experience along that line before, had you?

A. I had done quite a bit of studying from books and through knowledge I had learned from other people.

Q. Actually, you have been making \$300.00 to \$400.00 a month in that business, which is more than you were making at the time you were working as a mill worker, isn't that [161] right?

A. No, sir. At the time—may I explain, sir?

The Court: Go ahead.

Q. (By Mr. Callaway): Yes.

A. At the time that I gave your assistant that figure——

Q. You mean Mr. Lopardo here (indicating)?

A. Yes. ——that was my gross. Out of that I had to pay my expenses and living, and so forth.

Q. Well, you remember when your testimony was taken in Mr. Olson's office, your attorney, on the 21st of November of last year by Mr. Lopardo?

A. Yes.

Q. At that time you were given the following explanation, were you not, and I am reading on page 2, lines 10 to 26, inclusive, and lines 1 and 2 on page 3. This is Mr. Lopardo speaking:

“Probably your counsel has explained to you the nature of a deposition. However, to clarify it for the purpose of the record, please be advised that pursuant to certain sections of the Federal Law of Civil Procedure the defendant is entitled to ques-

(Testimony of William J. Byrne.)

tion you under oath as to certain matters concerning the allegations in your complaint.

“Though this proceeding appears to be informal, it actually has all the solemnity of a court proceedings. [162]

“After the questions are propounded and your answers given, they will be taken down by the reporter, typed up and put in pamphlet form, after which they will be submitted to you for reading. At that time you may make corrections, if you so desire. At the time of trial, however, if you do make any corrections, I will be entitled to ask you why you made those corrections.

“Therefore, to avoid that, in the event I ask any questions that are not clear to you, or you do not understand, or you do not hear, please ask me to repeat them or rephrase them so you can understand them. Is that clear?

“A. Yes.”

Then starting on page 3 at line 21:

“Q. Would you give us a rough approximation of your weekly intake, your earnings?

“A. Well, I would like to clarify it in this manner: I have only been in business a few months, and due to output of expenditures, my own personal income has been cut down to practically nil outside of living expenses.

“Q. I am not trying to pin you down to dollars and cents. Could you give us an approximation of your weekly income? [163]

(Testimony of William J. Byrne.)

“A. Well, it will vary from one hundred to several hundred.

“Q. Well, would you strike an average? You say you have been in business a few months now, and apparently you are earning money. Now, will you tell us how much you make on the average?

“A. On an average gross, \$200.00.

“Q. You have, however, brought in more in business than \$200.00, haven't you?

“A. Yes.

“Q. How high have you gone?

“A. Well, I can't possibly say offhand, without looking.

“Q. A rough approximation will do.

“A. Oh, \$350.00 to \$400.00.

“Q. Per week?

“A. Yes.”

Is that your testimony? A. Yes, sir.

Q. What prevented you from working at some type of work, Mr. Byrne, from the 1st of February to the 1st of July, 1949?

A. I spent quite a bit of time going from one mill to another, to different lumber companies, and so forth, trying to secure a position in that line of work and a position which I was able to do. [164]

Q. This law suit was filed on the 21st of January, 1949, is that right?

A. To the best of my knowledge.

Q. Does that have anything to do with your leaving your work on February 1st?

(Testimony of William J. Byrne.)

Mr. Olson: I object to that question.

The Court: He has a right to answer that. Overruled.

The Witness: No, sir.

Mr. Callaway: I think that is all.

Mr. Olson: Two questions.

Redirect Examination

By Mr. Olson:

Q. As a matter of fact, Mr. Byrne, you didn't leave your work on February 1st, you were laid off?

Mr. Callaway: Just a moment. That is leading.

Q. (By Mr. Olson): Did you voluntarily quit your work on February 1st, from Selby Company?

A. No.

Mr. Callaway: I object to counsel asking a leading question and educating the witness, and following it with one that is possibly proper.

The Court: The objection will be sustained.

Q. (By Mr. Olson): Why did you leave your work on February 1st, Mr. Byrne?

A. They let me go because due to my injury I was not [165] able to carry on the work that I was supposed to do, and I was holding up other men from their work. It was not up to the standard that I had done before.

Q. Hold your right hand up, Mr. Byrne, and make a fist.

(Witness complies.)

(Testimony of William J. Byrne.)

Q. Is that the best you can do with your little finger? A. Yes (indicating).

Mr. Olson: That is all.

Mr. Callaway: I have nothing further.

The Court: All right. Step down.

(Witness excused.)

Mr. Olson: I will call Dr. Sutherland to the stand.

DR. ROSS SUTHERLAND,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Ross Sutherland, M.D., 1332 Wilshire.

Direct Examination

By Mr. Olson:

Q. What is your business or profession, Dr. Sutherland?

A. Traumatic and orthopedic surgery.

Q. Are you licensed to practice medicine in the State of [166] California?

A. That is correct?

Q. How long have you been so licensed?

A. Since 1920.

Q. What schools have you graduated from and what degrees do you have?

A. Stanford of Southern California.

(Testimony of Dr. Ross Sutherland.)

Q. Medical School? A. That is correct.

Q. What degrees have you obtained?

A. M.D.

Q. You specialize in some branch of medicine?

A. In traumatic and orthopedic surgery.

Q. What does it mean?

A. Those are conditions as a result of direct trauma.

Q. Trauma means what?

A. Break and contusion of the tissues.

Q. By outside source.

A. By outside source.

Q. To the layman repairing injuries?

A. That is correct.

Q. Did you ever have occasion to examine William Byrne, the plaintiff in this action?

A. I examined him on November 25, 1949.

Q. Where was this examination held? [167]

A. It was made at my office.

Q. When you made this examination did you obtain a history of the patient's injury?

A. I did.

Q. What was that history?

A. The patient gave the following history, that on October 28, 1948, a steel casting broke, cutting tendons of the patient's right hand on the surface. An operation was performed on the hand by Dr. Detwiler of Burbank.

Q. Did you then make an examination of Mr. Byrne's hand? A. I did.

(Testimony of Dr. Ross Sutherland.)

Q. Will you describe what method you used in making this examination?

A. Well, the examination was a typical clinical examination and radiograph picture, and X-rayed the hand and found a chip fracture off the head of the fourth metacarpal—

Q. Stop there. What is the fourth metacarpal?

A. That is the bone from the wrist down to the first joint of the finger.

Q. Thank you. Continue.

A. This chip fracture had completely healed. There had been an injury to the flexure tendons of the fifth finger, which had been sutured.

Q. Just a minute. The flexure tendons are what? [168]

A. The tendons that bring the fingers down into the palm of the hand. There was also injury to the fourth finger over the metacarpal joint. This was repaired, except for a little weakness of the third phalanx.

Q. Did you find any abnormalities with Mr. Byrne's hand, as a result of your examination?

A. The examination revealed there was loss of flexion or the ability to bring the fifth finger down into the palm of the hand. The degrees of limitation of motion were as follows: Distal phalanx or the phalanx on the end, the extension or the ability to fully extend the finger was 160 over 180, or 20 per cent loss. Flexion of the distal phalanx was 0 over 90.

(Testimony of Dr. Ross Sutherland.)

The second phalanx, the middle one, extension 180 over 180; complete. Flexion was 0 over 90.

Metacarpal of this joint here (indicating), extension was 180 over 180; could get it fully straight. Flexion was 90 over 90.

The tip of the fifth finger failed to touch the palm of the hand by three inches.

Patient was advised to make repair of the flexure tendons in the fifth finger by surgery, which will require about a week's hospitalization, and about eight to ten weeks of further disability following surgery.

Q. Now, do I understand your testimony to be that you [169] recommend surgery be performed on this hand?

A. Unless it is performed on this hand the condition of the hand is permanent.

Q. What was your testimony regarding the loss of grip in that hand?

A. There is 25 per cent loss of hand grip.

Q. That will continue the rest of his life, unless reparative surgery is undergone?

A. That is correct.

Q. Will you explain to the jury what this operation consists of?

A. The operation consists of opening up the palmar surface of this fifth finger and approximating the tendon. It is a difficult job and should be done by a tendon specialist.

There may be some permanent disability even fol-

(Testimony of Dr. Ross Sutherland.)

lowing surgery, because it has been a long time since the tendons have been separated, in the proximal portion of this area of the tendon, if there is a point of severance retraction up into the direction of the wrist (indicating). There is also some slight hypesthesia or numbness of this finger, where the sensory nerve had been disturbed.

Q. You found that nerve had been disturbed in his hand?

A. He has a very small percentage of disturbance of sensation. [170]

Q. When a person receives a trauma or an injury, as Mr. Byrne did, the nature of it, is it apt to produce a numbing sensation of the hand at the time of the trauma?

A. Sometimes trauma will produce numbness of the part immediately at the time of the accident.

Q. What causes that?

A. That is due to disturbances of the sensory nerve being cut.

Q. How long can that numbness last?

A. Sometimes for hours or days.

Q. Is there any treatment for this type of injury, other than reparative surgery?

A. There is no other treatment that will approximate these tendons without surgery.

Q. Is there any—I will use the word advisedly—guarantee that reparative surgery will restore his hand to normal function?

Mr. Callaway: I object to that as calling for speculation or surmise.

(Testimony of Dr. Ross Sutherland.)

The Court: Overruled.

The Witness: I would say he would still have some residual permanent disability following surgery. It has been a long time since these tendons were injured or atrophied. They may be frayed. They may not repair within the period of time and there may be some residual weakness. [171]

Mr. Callaway: That is all speculation.

The Court: That is all right. Doctor, is the condition due to the incompetency of the surgeon who forgot to sew those tendons in a manner in which they should have been sewn?

The Witness: Definitely not, your Honor, because even perfect repair in a certain percentage of tendon cases will give way. It is a very difficult procedure, and even with the experts repairing them a certain percentage of failure occurs.

The Court: You say this would require not only a specialist, but a specialist within a specialty?

The Witness: Yes.

The Court: Isn't it likely that because the surgeon employed was the average run-of-the-mill surgeon that he may not have done the thing that your expert, plus expert, would have done?

The Witness: Well, no.

The Court: I know you gentlemen hesitate to answer that question, but this jury has a right to know whether this condition is partly caused by this man not getting the care he should have had, regardless of whoever is responsible for the failure to do it.

(Testimony of Dr. Ross Sutherland.)

The Witness: Your Honor, I don't know Dr. Detwiler. He may be a very expert man in tendons. As I tried to explain, [172] a certain percentage of cases done by experts are failures.

The Court: All right.

Q. (By Mr. Olson): How much does an operation of the type you recommend ordinarily cost?

A. Well, from a private standpoint I imagine specialists would charge this man anywhere from \$300.00 to \$500.00.

Q. How much hospitalization would be required?

A. Probably a week.

Q. In the hospital? A. Yes.

Q. How much permanent disability would you say the patient would have after that operation?

Mr. Callaway: I object to that as calling for rank speculation and conjecture.

The Court: It is conjectural. I will give the federal instructions as to experts to the jury. Overruled.

The Witness: Well, it may vary anywhere from five to ten per cent.

Q. (By Mr. Olson): I don't think you understood my question. What I meant to say—perhaps I didn't make it clear—assuming Mr. Byrne had this operation, how long would he be incapacitated because of the actual operation, from doing anything?

A. As I stated, maybe eight to ten weeks.

Q. That is what I was after. And that operation, as you state—I want to be sure I understand

(Testimony of Dr. Ross Sutherland)

it and the jury does—would require cutting into the hand? A. Oh, very definitely.

Q. When they cut into the hand, what would they do?

A. Well, they would bring the tendons down and proximate end to end. If the upper part of the tendon is too short, the tendon man may have to take a piece of tendon from one of the other tendons and graft it together. You can't tell what the degree of operation is in there until you get into it.

Q. Let me ask you this, Doctor: Would an injury to the tendon of the little finger tend to impair the functioning of the finger next to it?

A. Well, this man had some minor injury to the fourth finger. With the fifth finger's inability to make a full hand grip, there is a little disturbance in the grip, but it is minor. Minor disturbance of the fourth finger tendon, in reference to hand grip, the fifth finger produces somewhat of a slight block.

Q. That is what I wanted to know. A. Yes.
Mr. Olson: I think that is all.

Cross-Examination

By Mr. Callaway:

Q. Doctor, at the time you saw Mr. Byrne on November 25, [174] 1949, he wasn't wearing a cast, was he? A. No cast.

Q. He told you that he was disabled from October 28, 1948, to February 14, 1949?

A. Correct.

(Testimony of Dr. Ross Sutherland.)

Q. He then worked two weeks but then was off until May, 1949, is that right?

A. That is correct.

Q. In other words, as he recited those facts you took them down? A. That is right.

Q. Now, the only fracture that he received was a chip fracture on the fourth finger, isn't that right?

A. I have forgotten just which one, fourth or fifth, but, anyway, the check-up X-rays I made showed it had completely repaired.

Q. Healed? A. That is right.

Mr. Callaway: That is all.

The Court: All right.

Redirect Examination

By Mr. Olson:

Q. Did your examination disclose whether that fracture went through the joint of the bone or just the bone?

A. No. My examination didn't disclose that, because I [175] didn't have the original X-rays for comparison.

Q. You didn't see the original X-rays?

A. No.

Q. You had just the ones you took when you examined him? A. That is correct.

Mr. Olson: That is all.

The Court: Step down.

(Witness excused.)

Mr. Olson: Your Honor, may we approach the bench?

The Court: Yes.

(The following proceedings were had in the presence but out of the hearing of the jury:)

Mr. Olson: I was unable to get hold of Dr. Detwiler until 9:30 last night. He has an emergency tonsillectomy, and two others. He said he would get here as close between 10:30 and 11:00 as he could make it. Mr. Callaway will stipulate the minute he walks in I can call him.

Mr. Callaway: I have no objection to that.

The Court: You will have to rest.

If you are going to make a motion, I want you to make it so we will not be losing time.

Mr. Callaway: I will agree if the motion is not acted upon favorably he may put him on out of order.

The Court: It just does not relate to liability? [176]

Mr. Callaway: No.

The Court: I try not to be unreasonable in these matters.

Mr. Olson: I just want an understanding.

The Court: You know under what pressure I work. I do not want to wait for people to come in out of order.

Mr. Olson: It is my understanding that I am going to rest now, and I will put on Dr. Detwiler when he arrives.

(The following proceedings were had in the presence and hearing of the jury:)

Mr. Olson: At this time, subject to the stipulation of counsel, the plaintiff rests.

The Court: The question has arisen whether the motion you are about to make, Mr. Callaway, has to be made in the presence of the jury. I will hear it out of the presence of the jury.

Ladies and gentlemen of the jury, there are some legal matters that have to be taken up with the court before the defendant proceeds with the case. You will retire to the jury room, and we will call you.

May it be stipulated the usual admonition has been given to the jury?

Mr. Olson: So stipulated.

Mr. Callaway: So stipulated.

(The following proceedings were had out of the presence and hearing of the jury:) [177]

Mr. Callaway: Comes now the defendant Woodworkers Tool Works, a corporation, and moves this court for a judgment of nonsuit on the following grounds:

1. That there has been no evidence introduced that the defendant manufactured the item in question.

2. There has been no evidence that the defendant sold the device to plaintiff's employer.

3. There has been no evidence showing a causal connection between the breaking of the device and

the injuries sustained by the plaintiff. Those are the grounds on which the motion is predicated.

The Court: I want to say this, gentlemen: I have given this subject a great deal of thought and I think the law on the subject is contained in the cases which have been decided since 1940, beginning with *Kalash v. Los Angeles Ladder case*, and the others.

Mr. Callaway: Your Honor, may I give you my views on that?

The Court: Yes.

Mr. Callaway: I am familiar with the case of *Kalash v. Los Angeles Ladder* you have mentioned, your Honor. I don't feel that the law of California is applicable for the reason that certainly if there was any negligence it must have happened in Illinois. It couldn't have possibly happened in Los Angeles.

The Court: It is not a question of where negligence [178] occurs. It is the question of where the suit is brought. This is a transitory action.

In the leading case on the subject, the case in New York, Judge Cardozo did not decide it according to the law of Illinois, but under the law of New York.

Mr. Callaway: There was an action filed in New York.

The Court: That is right. We will take judicial notice of the fact your corporation is a corporation of the State of Michigan. The negligence there consisted of the faulty construction of a wheel that came off.

Mr. Callaway: Here is an action filed in the Federal Court by a citizen of California against a citizen of Illinois.

The Court: That is right.

Mr. Callaway: Claiming that the defendant corporation negligently manufactured an article. It is my contention under——

The Court: *Erie v. Tompkins*.

Mr. Callaway: Yes.

The Court: No. You misinterpret that case.

Mr. Callaway: I may misinterpret it, but that is my interpretation.

The Court: I have lived with that case. We have had to abolish a whole branch of law.

Mr. Callaway: I want to speak to you just a minute about the proof in this case. Where is there any proof we even [179] manufactured it? Certainly from the evidence adduced by the court itself, regardless of which State the court decides to follow, there is no evidence in this case that there is any causal connection between this device breaking and the injury that this man received.

The court asked these questions itself. You asked the witness several times, "Now, are you certain that all that had happened was a click?" And he told you that he was, at the time he jumped down on the floor.

Now, he has the board there. I don't know what happened and I don't guess there is anybody that can reconstruct what happened. He had the board and he let the board go.

Here is a device whirling at 7200 revolutions per minute. If the board went up, naturally, when the board is down under the cutting edge that is one thing, but if the board flew up and hit one of these arms, then that is quite another thing. There is no evidence here, I don't think, on which the court should let this jury guess and speculate.

The Court: Let me give you an illustration of how things repeat themselves since I have been on the bench here. I thought of it last night.

The reason I asked that question was to try to find out what caused the injury. I do not know what caused it, and the evidence does not show what the direct cause was. However, this is the situation: If that click which was caused by the [180] breaking set in motion the group of events that resulted in his injury, in view of the fact the click was not an ordinary click but was brought on by what actually later developed was a break in the instrument or the object, they are liable for the consequent injury.

I will give you an illustration of a case tried here about seven or eight years ago. A woman went to the basement of Sears, Roebuck where they were selling hardware. She was buying a door. The doors were suspended on a rack, sideways. They were hung just the way you see clothes hung in these large clothing stores. As she touched one of the doors the rack gave way and the whole group of doors struck the floor. They did not strike her. But it frightened her and she backed away from them and, unfortunately, backed into a piece of ma

chinery which she could not see. She hurt herself in the usual place where women hurt themselves when they are hurt, that is, the sacroiliac region.

I am not going to say what the result of the case was, but I sent the case to the jury although there was no evidence whatsoever in that case of any direct relation between the two. She was not hit by anything. The unusual event caused her to react in a certain way, which an ordinary human being would react in, and the injury resulted.

In the case if the click were, as he said, an unnatural click, and set in motion the chain of events, the mere fact [181] we do not know whether he was actually cut by the flying pieces of steel or whether his hand was cut when he ducked—that is a good expression, although it does not sound very nice, but it expresses the situation—it is traceable to this untoward event.

The Supreme Court of California has said that expert testimony to the effect that a particular accident is traceable to faulty manufacture is enough to present a *prima facie* case.

Mr. Callaway: Yes, your Honor. But let me give you my views on that.

The Court: All right.

Mr. Callaway: Now, the court will have to hold, as a matter of law that the proximate cause or the thing that set the other matters in motion was a click.

Now, I don't know how the court could know that that click might not have been a small piece of steel in some of the wood he was working on.

The Court: I do not have to decide how I would hold. You are the one who asked for a jury. If you had wanted my reaction to the facts you did not need to have asked for a jury.

Mr. Callaway: This is a matter of law.

The Court: If you had wanted my reaction to the facts you did not need to ask for a jury. You asked for a jury and [182] you are entitled to their reaction and not mine.

Mr. Callaway: At this time I am entitled to have your legal ruling on the evidence, if the evidence is not sufficient to present a factual situation upon which the jury should pass.

The Court: I do not agree with you. I think, in the first place, we are bound by the law of California and the law of California as set forth in the latest cases on the subject, which I will read into the record in a minute, holds that the facts such as are presented here are sufficient to take the case to the jury.

I want to refer to the cases. I will cite the leading ones, all of which I have here.

The cases I refer to are: *Kalash v. Los Angeles Ladder Company*, 1 Cal. (2d) 229; *Dryden v. Continental Baking Company*, 11 Cal. (2d) 33; *Honey v. City Dairy*, 22 Cal. (2d) 614; *Escola v. Coca-Cola Bottling Company*, 24 Cal. (2d) 453; *Sheward v. Virtue*, 20 Cal. (2d) 410; and then the case from which both of you borrowed instructions, *O'Rourke v. Day & Night Water Heater Company*, 31 Cal. App. (2d) 364. I am citing that case be

cause, while a petition for hearing was not applied for, the Supreme Court has on several occasions approved it.

The *Gerber v. Faber* case, 54 Cal. App. (2d) 674, has language which I do not think the Supreme Court would approve. [183] For that reason I am not going to give any instructions that are based on it. My good friend and former associate, Judge Shinn, was making a lot of new law at a time when there was not any. He used language which the Supreme Court at the present time would not approve.

For instance, he intimates that if a man bought from a manufacturer the best product, that would be a defense. That is not the law as laid down by the Supreme Court.

In fact, the Supreme Court has specifically said in one of these cases, *Sheward v. Virtue*:

“Virtue Brothers received rough iron leg castings moulded to their own patterns by another firm. It is conceded that freedom from negligence does not inure to the manufacturer because it purchased parts from another which were defective.”

That contradicts the *Gerber* case, although the *Gerber* case was later. In *Gerber v. Faber*, 54 Cal. App. (2d), at page 680, it will give you my view, and that will also give you an indication of my view on the instructions.

Of course, when the case is closed, the evidence

is closed, before you argue, I shall indicate to you my action upon the instructions which you have submitted. What I have already stated is going to save time, because you will get an idea what I perceive the law to be. [184]

Mr. Olson: May I make two comments?

The Court: Just a minute.

Mr. Olson: Excuse me.

The Court: I will hear anything additionally you want me to add. I have not ruled as yet.

Mr. Callaway: I fail to see where there is any evidence, where the complaint alleges that we even manufacture it.

The Court: Our Circuit Court, unfortunately, has adopted the scintilla rule now. It never was the rule in this Circuit. In fact, I was congratulated once by Mr. Justice Miller, that fortunately the scintilla rule does not apply. With me as a guinea pig the Circuit Court deviated from that, and beginning with the Harvey case and other cases, they have held that practically a scintilla of evidence was enough.

Mr. Callaway: I don't think there is even a scintilla of evidence that we sold this article as alleged to the plaintiff's employer.

The Court: I do not think an issue is made of that.

Mr. Callaway: Yes, he alleges it and we deny it.

The Court: I think there is an inference to be drawn from it. If you want to rest, you have a good point. You had better rest, without putting in

any evidence. When you put in your evidence, you are going to supply it.

Mr. Callaway: I am going to put on evidence, because I [185] won't supply it. There is nothing in my evidence to supply it.

Mr. Olson: May I make a comment for the record?

The Court: Yes.

Mr. Olson: Counsel for defendant has said there is not even a scintilla of evidence that this part was manufactured by the defendant. I call attention to the answer of defendant on page 2, paragraph D:

“Answering the incorporated paragraph V defendant admits that it sells Champion panel raiser heads; that it partially manufactured said article, but alleges in this connection that it did not cast the said raiser head nor any part thereof.”

Mr. Callaway: Are you trying to talk the judge out of his ruling?

Mr. Olson: I want that for the record. It is admitted in the answer.

The Court: I thought there was enough of admission of manufacture to bring it into the case.

All right, gentlemen. We will take a short recess. We will then call the jury and you may proceed with the evidence.

(Short recess taken.)

(The following proceedings were had in the presence and [186] hearing of the jury:)

The Court: Let the record show the jury is in the box. Proceed.

Mr. Olson: Dr. Detwiler is in court now, your Honor.

DR. HOWARD F. DETWILER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Howard F. Detwiler.

Direct Examination

By Mr. Olson:

Q. Dr. Detwiler, it is very difficult to hear you back here, and the jurors might have difficulty. Keep your voice up as much as possible, will you?

A. All right.

Q. What is your business or profession?

A. I am a physician and surgeon, M.D.

Q. Are you licensed to practice medicine in the State of California? A. Yes.

Q. How long have you been a physician and surgeon? A. Since 1941.

Q. What schools have you attended and what degrees have [187] you obtained?

A. I attended the College of Medical Evangelist at Loma Linda, and I hold an M.D. degree.

Q. Do you specialize in any particular phase of medicine, Doctor?

A. I have not formally specialized in a residence.

(Testimony of Dr. Howard F. Detwiler.)

However, I have been particularly interested in industrial surgery.

Q. What do you mean by "industrial surgery"?

A. That means the care of cases resulting from injuries sustained while the patient is at work.

Q. Occasioned by trauma?

A. That is right, trauma or other causes, related to their employment.

Q. Have you ever had occasion to examine or treat William Byrne, the plaintiff in this action?

A. Yes.

Q. When was the first time you saw Mr. Byrne?

A. 28th of October, 1948.

Q. What was the occasion for your seeing him?

A. Mr. Byrne was brought into my office with a severe injury to his hand.

Q. Which hand? A. His right hand.

Q. Do you know what time that was? [188]

A. 9:00 o'clock he was injured. He was there about 15 minutes later, as I recall.

Q. It is your understanding he was in your office approximately 15 minutes after he was injured?

A. 10 or 15 minutes, yes.

Q. Was he bleeding? A. Yes.

Q. Did you make any examination of his injury?

A. I did.

Q. What did you determine his injury to be?

A. We detected a deep 4-inch laceration of his right hand which extended from the base of his ring finger in the distal part of the palmar surface

(Testimony of Dr. Howard F. Detwiler.)

around to the dorsal surface of the right small finger base (indicating).

Q. Will you explain that, using your hand as an example?

A. The laceration extended from the base of the ring finger around and to the dorsal aspect of the base of the small finger of his right hand (indicating).

Q. Did you obtain any history from the patient regarding the accident?

A. Yes. He stated that he had been working with a shaper and that something happened to the wheel, and that he received this injury as a result of that.

Mr. Callaway: Your Honor, I wish at this time to ask the court to instruct the witness the history a patient gives a [189] doctor is admissible for the sole purpose of being what he told the doctor and not the truth of the statement he made.

The Court: The court so instructs the witness. What took place has been testified to by the plaintiff himself. The doctor, in basing his diagnosis, must rely upon the origin of the ailment complained of and therefore he is allowed to say what the patient told him, but as to whether the facts the patient told him are true or not is for the jury to determine, on the basis of the evidence given by the patient himself in this case the plaintiff.

Q. (By Mr. Olson): What, if anything, did you do at that time, the first occasion Mr. Byrne visited you with this injury, to treat him?

(Testimony of Dr. Howard F. Detwiler.)

A. First of all, we stopped his hemorrhage.

Q. How?

A. By application of the usual hemostats to bleeding area.

Q. What is a hemorrhage?

A. Hemostat is a small pincers that controls bleeding.

Q. No. What is a hemorrhage?

A. Loss of blood. In this case from trauma.

Q. And what did you do, if anything?

A. We X-rayed the hand.

Q. Did you get a report from that X-ray?

A. Yes. [190]

Q. Will you tell the jury what the report was?

A. The X-ray showed a fracture—I will read the report, if I may:

“There is a fracture at the base of the third proximal phalanx on the medial aspect of the base.” That means this first finger (indicating). The medial aspect is the side toward the body, holding the palm this way (indicating).

“The structure of the skin and soft tissues is seen. The picture after surgery is made and shows the fracture extends into the soft surface, and the fragment is in good position.”

Q. Do you have those X-rays with you, Doctor?

A. Yes.

Q. Were these X-rays taken at the same time, both of them?

A. One was taken before and one after. Don't

(Testimony of Dr. Howard F. Detwiler.)

ask me which was taken when. I think I can tell you, though.

Q. We will wait for the shadow box.

A. I mean the same day, I understand they were taken.

Q. One before you treated him and one afterwards, is that right?

A. That is right. There are two views. An AP view. That is with the hand out in this position and the rays striking through the flat surface (indicating). [191]

Q. Is this the X-ray taken before surgery or afterward (indicating)?

A. To be very truthful, I read the report of our radiologist in our office, who reads all our X-rays; I am not absolutely positive?

Q. You don't take the X-rays?

A. My radiologist takes them.

Q. He interprets them?

A. The technician takes the X-rays and the radiologist reads them. We certainly read them. The reason I say I am not certain, even though Dr. Debb in his report mentioned it showed repair of soft tissue, I believe this is the one taken before and this is the one taken afterwards (indicating). However, there would be no way to prove it. That doesn't make any difference.

Q. Does the X-ray show a fracture of the distal phalanx?

A. No, I don't believe they do.

Q. Your report said there was a fracture?

(Testimony of Dr. Howard F. Detwiler.)

A. Proximal.

Q. Was there a fracture?

A. Yes, there was a fracture in the base of the proximal phalanx, extending from here to here (indicating). Equally well seen on this view, extending from here to here, proximal phalanx (indicating).

Q. The fracture went through the joint?

A. Yes.

Q. Is a fracture through a joint more serious than a fracture that doesn't strike a joint?

A. Yes.

Q. Why?

A. In this case particularly because longer immobilization is required. The longer you must immobilize tendons that are repaired the more likely you are of a permanently stiff and atrophied finger. And also, the likelihood of infection and permanent limitation of motion from the injury to the joint.

Q. As I understand you, in a layman's language, because the fracture went through the joint it would require a longer period of being immobilized?

A. Yes.

Q. Which, in turn, would affect the healing of the tendons?

A. That is true.

Q. That is what you mean?

A. That is right.

Q. You saw Mr. Byrne, you stopped the bleeding, you had X-rays taken of his hand. Then what, if anything, did you do?

A. We determined the degree of impairment of

(Testimony of Dr. Howard F. Detwiler.)

sensation [193] in his hand, indicating nerve injury, and also the degree of impairment of function of his hand.

Q. How was that done?

A. By having the patient flex his fingers.

Q. Could the patient flex his fingers?

A. He could not flex his small finger.

Q. Is that why you determined he had a severed tendon? A. Yes.

Q. What did you do then if anything?

A. We found it necessary to enlarge his wound by approximately a half an inch, in order to find the cut tendon end, which always retracts up into the arm. We united his tendon, using cotton suture.

Q. In other words, you sewed the tendon together? A. Yes.

Q. How big is a tendon of a little finger?

A. Approximately an eighth of an inch in diameter.

Q. You had to probe and find that?

A. Yes.

Mr. Callaway: Mr. Olson: will you keep your voice up?

Q. (By Mr. Olson): What is a compound fracture, Doctor?

A. A compound fracture is any fracture open to the exterior.

Q. Did you find Mr. Byrne had a compound fracture? A. Yes. [194]

Q. What did you do after you united the tendon?

(Testimony of Dr. Howard F. Detwiler.)

A. We attempted to unite the severed nerves, which is often a very difficult and sometimes well-nigh impossible job. But we always attempt to unite them with a suture. We then sewed up the deep tissues and closed the skin, and we applied a cast to his——

Q. Plaster cast?

A. Plaster cast to his hand and his forearm.

Q. What was the purpose of the plaster cast?

A. To immobilize both the tendon and the joint.

Q. How long was he in the plaster cast?

A. The cast was taken off the 27th of November.

Q. It was put on on the 28th of October?

A. Yes.

Q. So he was in the cast one month. Do you know how many sutures you took in Mr. Byrne's hand? A. Seventy plus.

Q. What do you mean?

A. We took at least seventy. That is what I have on my record.

Q. You took seventy or more sutures in his hand?

A. Yes. His hand was badly macerated. It wasn't just a clean cut, it was a macerated hand.

Q. I will ask you this, Doctor: Does injury to a tendon, as in this case the severance of a small finger tendon, [195] in any way affect the use of the tendon next to that? A. Yes.

Q. How?

A. Well, now, naturally they function in sym-

(Testimony of Dr. Howard F. Detwiler.)

pathy, they function together, usually, I mean, ordinarily in the function of the performance of a man's duties. Also, the immobilization naturally in the repair of a tendon would affect somewhat the adjacent tendon.

Q. Would it affect the nerves surrounding those tendons?

A. It would not affect the nerve unless the nerve was cut.

Q. Was the nerve of the small finger cut?

A. Yes.

Q. Severed? A. Yes, and macerated.

Q. What do you mean "macerated"?

A. Chewed up.

Q. When was the last time you saw Mr. Byrne's hand, except this morning outside of court?

A. I saw Mr. Byrne, I believe, a week ago today, on the 10th.

Q. Did you observe in that last examination whether Mr. Byrne's right finger is smaller than his left finger? A. I did.

Q. It was? [196] A. Yes.

Q. What causes that?

A. Two things. First of all, nerve injury. Atrophy of tissue, result of nerve injury.

Secondly, atrophy of disuse. In other words shriveling of the part because it isn't used properly

Q. Do you have a record of how many times Mr. Byrne visited your office for treatment?

A. Yes.

(Testimony of Dr. Howard F. Detwiler.)

Q. How many times does it disclose?

A. Twenty-five times.

Q. Do you know a Dr. Boyes? A. Yes.

Q. Who is Dr. Boyes?

A. Dr. Boyes is the leading hand surgeon in Los Angeles.

Q. Have you ever discussed this case with Dr. Boyes?

Mr. Callaway: I object to that as calling for hearsay.

The Court: That is merely preliminary.

Q. (By Mr. Olson): You say you have?

A. Yes.

Q. To your knowledge did Dr. Boyes treat Mr. Byrne after you did?

A. Dr. Boyes saw Mr. Byrne during the same period. Dr. Boyes consulted with him on the 21st of December, and I saw him several times after that also. [197]

Q. Did Dr. Boyes' diagnosis of Mr. Byrne's condition agree with yours?

Mr. Callaway: I object.

Mr. Olson: I will strike that.

The Court: That is a leading question.

Mr. Olson: I don't mean to ask a leading question.

The Court: Ladies and gentlemen of the jury, when a question is asked and the objection is sustained you are not to assume what the answer is going to be. It is as though you had not heard it at all.

(Testimony of Dr. Howard F. Detwiler.)

Q. (By Mr. Olson): Doctor, what do you doctors mean by temporary as distinguished from permanent disability?

A. Temporary disability is disability of short duration, which will improve in the normal event of Nature's healing. Permanent disability is the disability that patient will carry with him the rest of his life, depending on the degree of the injury.

Q. In your opinion, based upon your examination of Mr. Byrne, does he have a permanent disability? A. Yes.

Q. In your opinion would an operation on this hand be advisable? A. Yes.

Q. In your opinion should such an operation be performed by a specialist? [198]

A. Definitely so.

Q. Why?

A. This is one of the most difficult procedures that we have surgically to perform. In all probability if Mr. Byrne has a surgical procedure it will require tendon transplants. I say in all probability because I don't know exactly what the specialist will do. However, I do know what is done ordinarily. A small tendon is taken out of the forearm and the tendon is removed completely from this scarred area, and this new tendon is implanted into the finger. In other words, into the base of the terminal phalanx of the injured part. The tendon is cut here, and this is all new tendon we get around this scar tissue that caused a lot of disability in

(Testimony of Dr. Howard F. Detwiler.)

Mr. Byrne's case (indicating). Definitely he should have this procedure done, in my opinion.

Q. Do you know what the average expense of such an operation is?

A. That is a hard question to answer. It is an expensive procedure.

Q. How long a period of hospitalization is ordinarily required for a person that undergoes such an operation?

A. Not a long period of hospitalization.

Q. How long?

A. Two or three days, so far as the time in the hospital is concerned. [199]

Q. Would the hand be put in a cast?

A. Yes.

Q. How long ordinarily would the hand remain in a cast?

A. At least three or four weeks.

Q. Are those operations in your experience and knowledge always successful?

A. By no means.

Q. What is the usual result of such an operation?

A. That is a hard question to answer. I can tell you the ideal result.

Q. Yes.

A. I know that the function in this case would be greatly improved by an operation. To say that the function would be normal, that I very, very seriously doubt in this case. But the function would improve greatly, as far as the ability to flex the finger.

(Testimony of Dr. Howard F. Detwiler.)

Also, in this case there should be another attempted nerve repair. Now, the tissues have all healed. There is still numbness. In other words, there is still lack of nerve supply to the finger. That should be done at the same time.

Q. What is nerve repair?

A. The scarred ends of the nerves are isolated and the nerves are united.

Q. How large are nerves? [200]

A. Extremely small.

Q. Sewed together?

A. Sewed together they are about the size of an ordinary string.

Q. If I have asked this question somebody correct me. I don't think I have. Would a person who received such an injury as Mr. Byrne received experience a feeling of numbness immediately after the trauma?

A. Yes.

Q. Why?

A. Severance of nerves.

Q. In this case you testified the nerve was severed?

A. Yes.

The Court: Doctor, could you tell from your experience in industrial surgery, where you deal with cuts and bruises and contusions and things like that constantly, what type of trauma caused this injury?

The Witness: That is a hard question, Judge to answer.

The Court: If it were easy, I would not ask it

The Witness: I don't believe that that could be answered, except we know that it was a forceful injury.

(Testimony of Dr. Howard F. Detwiler.)

The Court: Could you tell it was a sharp instrument that caused it?

The Witness: It was not a knifelike blow. Not like when a glass—— [201]

The Court: Could it be caused by a piece of wood striking the hand, a piece of wood going at great velocity?

The Witness: You ask if it could be. Absolutely, it could be.

The Court: In other words, you cannot say that this was actually caused by metal coming in contact with a metal object?

The Witness: I feel in this case there is no question—I mean, it was the metal that caused it, but——

The Court: It was not the metal?

The Witness: It was the metal that caused it, but you asked if it could be a wood piece——

The Court: In this case you think the metal caused it?

The Witness: Yes. I don't think there is any question in this case.

The Court: All right. The reason I am asking is because the plaintiff himself could not tell what actually caused it, what his hand came in contact with that caused the injury. That is the reason I am asking you if you can make any deductions from the way it looked.

The Witness: We felt there was no question it was a metallic instrument that had caused this.

(Testimony of Dr. Howard F. Detwiler.)

Q. (By Mr. Olson): From your observance of the wound when Mr. Byrne came in, would it be a forceful impact? A. Yes. [202]

Q. Because of the shattering of the bone?

A. Yes.

Q. Because of the breaking of the bone?

A. Yes, and maceration of tissue.

Q. What do you mean?

A. Well, very vulgarly to describe it, chewed up; hamburger.

Q. Did Mr. Byrne complain of pain when you saw him? A. He did, indeed.

Q. Would you say he was in great pain?

A. No, I wouldn't. Trauma of this type doesn't produce great pain. It may produce shock, but usually trauma of this type——

The Court: Is it localized?

The Witness: Relatively. And it isn't the severe type of pain you get after infections. But he certainly had his share of pain at the time.

Q. (By Mr. Olson): Later?

A. At the time, chiefly. He had his share of pain, but you asked——

Q. Was he in a condition of shock?

A. He was not in severe shock.

Q. But he was in shock?

Mr. Callaway: Are you going to lead the doctor?

Q. (By Mr. Olson): Was he in shock? Was he in any shock? [203] You just brought that question to my mind.

(Testimony of Dr. Howard F. Detwiler.)

A. Well, all I can say, in answer to that question, is that most patients with injuries of this type have a degree of shock. I don't recall whether Mr. Byrne was in shock or not. I don't have a note.

The Court: The shock would not last long?

The Witness: Only a few minutes.

The Court: There was no evidence of shock when you saw him?

The Witness: No severe shock that would even warrant our putting it on his record.

The Court: I see.

Q. (By Mr. Olson): What is the effect of shock?

A. Shock is manifested by collapse of the patient, marked pallor of the patient, often fainting and passing out, cold clammy perspiration and a marked fallen blood pressure.

Q. Were his senses as acute in shock as a person not in shock?

A. No, but I don't mean to infer that Mr. Byrne was in a severe state of shock.

Q. In your opinion, Doctor, excluding an operation that we have discussed, will Mr. Byrne's hand remain as it is now for the rest of his life?

A. No. I believe not. I believe it will get worse.

Q. And why?

A. Obviously, Mr. Byrne has no flexion motion, compensatory union of the exterior tendons. Over a period of years it may even cause deformity of his finger. I mean, even a pulling backward, in

(Testimony of Dr. Howard F. Detwiler.)

time, and there again the nerves apparently—we can't say for certain that the nerves are not united, because we attempted to unite them. We can say this: There is a lot of numbness still, indicating that if the nerves were united that the sensation has not as yet traveled down the nerve root which often takes a period of several years.

If this does not take effect there again he will have a tendency of continued atrophy of his finger. In other words, a continued tendency to shriveling, so far as his finger is concerned. It should be increasingly in his way if it isn't repaired.

Mr. Olson: Your witness.

Cross-Examination

By Mr. Callaway:

Q. Doctor, let's take a look at those X-rays again, now, you are talking about.

Do you see a clearly defined fracture line there at all?

A. You see a very clearly defined fracture line extremely clear. There is absolutely no question of the fracture. It extends from here right down into the joint surface [205] (indicating).

Q. This little piece right there (indicating)?

A. That is right.

Q. It is this little piece (indicating)? Am I doing it right?

A. You have one finger on the right end, at an rate.

(Testimony of Dr. Howard F. Detwiler.)

Q. Mark it on there with a fountain pen.

A. That is it, approximately (indicating). Here it is again here (indicating).

Q. There is no displacement there?

A. Very mild displacement.

Q. Now, wouldn't you expect, if he had had a blow at that area, with a blunt instrument, to get a more extensive fracture of the bone?

A. No, I wouldn't.

Q. You wouldn't? A. No, I wouldn't.

Q. That is what causes bones to shatter and break and displace, isn't it, force? A. Force.

Q. Now, of course, if you had this contraption here, one whirling in one direction and one the other at 7200 revolutions per minute——

Mr. Olson: Correction. They don't go in opposite directions. [206]

Mr. Callaway: All right. In the same direction, then.

Q. (By Mr. Callaway): ——and you got cut, of course the force of this blade might very easily at that speed fracture your finger, might it not?

A. Yes.

Q. It also would, traveling at that speed, chew up your hand pretty badly before you could get it out of there, wouldn't it?

A. Absolutely.

Q. Well, now, if an operation on this gentleman's hand is indicated, why hasn't it been done?

Mr. Olson: I object to that question as calling for a conclusion of the witness.

(Testimony of Dr. Howard F. Detwiler.)

The Court: Read the question.

(The question was read.)

The Court: So far as you know, Doctor. I don't know how he would know that.

Mr. Olson: It calls for a conclusion, your Honor.

The Court: He was not giving a wholesale job to do all the operating that is necessary. The patient has something to say about it.

Mr. Callaway: All right.

The Court: I will sustain the objection.

Mr. Callaway: Very well. I don't think I have anything more. Just a minute, please. [207]

Q. (By Mr. Callaway): Doctor, do you have any further use for those X-rays?

A. We always keep our X-rays.

The Court: That does not make any difference. If you want them, I will take them. We can return them when the case is finished.

Mr. Callaway: I don't want to take them. I would like to have them, and if the doctor wants them back we can return them.

The Court: They will be withdrawn. We will apply the same rule to them we apply to others. We will take them and return them to the doctor when the case is concluded.

Mr. Olson: All right.

The Court: It may be received in evidence.

The Clerk: As Defendant's exhibits, your Honor?

(Testimony of Dr. Howard F. Detwiler.)

The Court: Yes.

The Clerk: Defendant's Exhibit B, in evidence.

(The X-rays referred to were marked Defendant's Exhibit B, and were received in evidence.)

The Court: The jurors may want to look at them. If you do, we will send the shadow box out to you.

Q. (By Mr. Callaway): I don't see any date on this.

A. There is the date there (indicating).

Mr. Callaway: That is all.

The Court: Any redirect examination? [208]

Mr. Olson: No redirect, your Honor.

The Court: You may be excused, Dr. Detwiler.

(Witness excused.)

The Court: It will be stipulated this testimony may be considered and will appear in the record as given before the plaintiff rested.

Mr. Callaway: So stipulated.

Mr. Olson: Yes.

The Court: And that the motion that was made may also appear as though made after this testimony.

Mr. Olson: The plaintiff rests, with one exception. I would like just for the record—I have understood your ruling, and I am not arguing with it—is it my understanding that I am not going to be allowed to have Dr. Boyes testify in this case

because of the fact he is unobtainable in New York until Monday morning?

The Court: You state it as a fact. I have not ruled on anything. He is not here.

Mr. Olson: I would like to ask permission——

The Court: The doctor is not here, and that is all there is to it. He is not here, and I am not continuing any case to wait for any doctor. That is all there is to it. You are supposed to have your doctor here.

Mr. Olson: That is what I want.

The Court: Do not say you are not being permitted to put [209] him on. You do not have him here, and that is all there is to it, and you have rested.

If Doctor Boyes comes here before the case is concluded, if you ask me, I will allow you to put him on out of order.

Mr. Olson: He can't be here until Monday.

Mr. Callaway: Mr. Townsend.

JEROME B. TOWNSEND

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Jerome B. Townsend.

Direct Examination

By Mr. Callaway:

Q. Where do you reside?

(Testimony of Jerome B. Townsend.)

A. Sherman Oaks.

Q. What is your business or occupation?

A. I am a machine salesman.

Q. For whom? A. Woodworkers Supply.

Q. Is that Woodworkers Supply Company of Los Angeles? A. That is right.

Q. By the way, Mr. Townsend, did you have anything to do with the sale to the Selby Company of a panel raiser head? [210]

A. To the extent that they saw one in operation and called us up and ordered it.

Q. Did you take the order? A. Yes.

Q. What did you do, in turn?

A. We sent the order to the Woodworkers Tool Works in Chicago.

Mr. Olson: At this time I would like to object to this whole line of testimony on the ground it is incompetent, irrelevant and immaterial, and has nothing to do with the issues in this case.

The Court: Overruled. Go ahead.

Q. (By Mr. Callaway): Now, was the head returned to you or shipped directly to the——

A. Shipped direct to the customer.

Q. Did you so specify? A. Yes.

Q. Now, I will ask you what connection the Woodworkers Supply Company of Los Angeles has with the Woodworkers Tool Works in Chicago.

Mr. Olson: Don't answer that. I wish to object to that question on the ground it is incompetent, irrelevant and immaterial. On the further

(Testimony of Jerome B. Townsend.)

ground this witness—there is no background laid to show this witness is competent to make—— [211]

The Court: We will find that out. Overruled. I think in all these cases the relationship of the manufacturer to the person who actually uses the product is an important element in the chain causation.

Mr. Olson: If I may just add this: This is an obvious attempt to bring in the question of the Court's jurisdiction, which has been ruled on.

The Court: There is no question of jurisdiction here.

Mr. Olson: Certainly,——

The Court: You need not be afraid. I will wait for jurisdiction.

Mr. Olson: Thank you.

The Court: That is not your job. That is mine.

Mr. Olson: That is all I am worried about.

The Court: They have submitted to jurisdiction. They have not attacked the jurisdiction.

Mr. Olson: On a motion.

The Court: That is denied.

Mr. Olson: Maybe I am wrong, I hope I am, and I wish to be corrected if I am not. It is my impression that they have made their record, insofar as the jurisdiction is concerned, and been ruled upon. I don't want this further proof of lack of jurisdiction to be in this record.

The Court: There is nothing before the Court

(Testimony of Jerome B. Townsend.)

on the question of jurisdiction, nothing to be submitted to the jury. [212] Let us go on.

Q. (By Mr. Callaway): You may answer.

A. To the extent that they handle merchandise of this nature when we have an order for them, they buy direct from them.

Q. Do you handle any other products, other than those made by the Woodworkers Tool Works?

A. Hundreds of them.

Q. Do you stock this particular item?

A. No.

Q. Does the Woodworkers Tool Works of Chicago own any interest in the Woodworkers Supply Company? A. None at all.

Mr. Olson: I object to that question.

The Court: Overruled.

Mr. Olson: This man is obviously incompetent to know that. He is a salesman.

The Court: Overruled.

Q. (By Mr. Callaway: Do they have anything to do with the fixing of the policy of how you run your business? A. None.

Q. As I understand it, the Woodworkers Supply sells woodworking machinery and supplies retail.

A. That is correct.

Q. And that you buy products from various companies [213] at the wholesale price, and sell them.

The Court: I will sustain the objection. You are merely repeating what the witness has already testi-

(Testimony of Jerome B. Townsend.)

fied. It is not necessary. The jury heard him, in the first place.

Mr. Callaway: Very well, your Honor.

Q. (By Mr. Callaway): Now, was the Selby Company billed for this particular panel head?

A. They were.

Q. I will show you a photostatic copy of a bill.

Mr. Olson: Excuse me, Mr. Callaway. What is that torn off there?

Mr. Callaway: I don't know.

Mr. Olson: I do. Can I give you one of my copies that is complete? I object to that with the part torn off, it is not complete. I know what is on there.

Mr. Callaway: I do, too, and it is self-serving.

Q. (By Mr. Callaway): Do you recognize that as being a photostatic copy of an invoice of the Woodworkers Supply Company to the Selby Company? A. Yes.

Mr. Callaway: I offer it in evidence.

Mr. Olson: I object to the introduction of that I have a complete copy.

Mr. Callaway: Let's present it to the Court and let him [214] rule on it.

The Court: Just a minute. Everything is in the open here, unless I want to have something here at the bench. I do not like attorneys to rush to the bench every minute. The jurors get the impression we are hiding something from them.

State your objection, Mr. Olson.

(Testimony of Jerome B. Townsend.)

Mr. Olson: I object to the introduction of that document on the ground it is not complete.

Q. Have you the complete one?

Mr. Olson: Yes.

The Court: The bill presented to you?

Mr. Olson: I have a copy of that.

The Court: Bring it to me and let me look at it and I will determine whether that should go in or not. If it has any notation put on by the buyer, then it is an addition to it.

Mr. Callaway: That is what it has.

The Court: I will look at it.

Mr. Olson: I can't find it your Honor. I had five of them.

The Court: Then I will overrule the objection and I will let you show me later, if you find it, if it contains something that you think should go in, if it contains anything that was there when the bill was received. Anything [215] they put on there cannot go in.

Mr. Olson: Anything the Selby Company put on?

The Court: Yes. A bill is a bill the way you receive it.

Mr. Olson: The Selby Company is not a party to this action.

The Court: You cannot bind anybody by something that was not on the bill, that they supplied. It is self-serving.

Mr. Olson: I will withdraw the objection.

(Testimony of Jerome B. Townsend.)

The Court: All right. It may be received.

Mr. Clerk: Defendant's Exhibit C in evidence.

(The document referred to was marked Defendant's Exhibit C, and was received in evidence.)

Q. (By Mr. Callaway): Mr. Townsend, what schools or colleges have you attended?

A. Culver Military Academy at Culver, Indiana, and Southern Methodist University at Dallas, Texas.

Q. After you left school, what did you do?

A. I went to work in the woodshops to learn machinery.

Q. And how long did you work?

A. Approximately eight years.

Q. Are you familiar with machinery that is used in connection with cutting of wood?

A. Very much. That is my business.

Q. Did you have anything to do with the superintendency [216] of a millwork shop during that eight years?

A. Not during the eight years.

Q. Afterwards?

A. Yes, sir.

Q. When was that?

A. That was 1942 to '44, superintendent of Anderson Desk Company in Los Angeles.

Q. Do you know what a joiner is?

A. Yes, sir.

Q. What is a joiner?

A. A joiner is a machine for the purpose of removing twist or warp from the surface of wood,

(Testimony of Jerome B. Townsend.)

for the purpose of putting on a flat joint for joining.

Q. What is a shaper?

A. A shaper is what it specifies, for the purpose of producing on a piece of wood a shape or a contour or a detail.

Q. Do you have an opinion as to the length of time it takes, as an apprentice, before you become an experienced shaper?

Mr. Olson: May I object to that question as calling for an opinion of the witness, who, I do not feel, has been qualified as an expert in that field to which he is testifying.

The Court: Overruled. I think it is all preliminary to qualifying him to testify to certain things. [217]

The Witness: In my opinion it would take two and a half years or possibly more to produce a shaper man to be responsible for any operation to be presented to him.

Q. (By Mr. Callaway): Mr. Townsend, did you specify at the time that Selby Company ordered this head the brand of head, or did they specify?

A. They did.

Q. I take it there are other manufacturers making similar products? A. Yes, sir.

Q. Do you know of any product on the market, Mr. Townsend, of a type of this where the arms are not made out of cast steel? A. Not any more.

Mr. Olson: I object to the question on the

(Testimony of Jerome B. Townsend.)

ground this man has not been qualified either as a chemist or engineer.

The Court: That is all right. He has testified he is familiar with the market. He asked if there were any on the market.

Mr. Olson: I don't think that was the question.

The Court: Yes. Do you know of any other product on the market like this, which is not made of cast steel? That was the question.

The Witness: Not any more.

Q. (By Mr. Callaway): What did they use to make them out [218] of?

A. Brass and bronze.

Q. Were the brass and bronze ones as strong, have the tensile strength, as cast steel?

A. No, they did not.

Mr. Olson: I object to that question, and the answer.

The Court: I will sustain the objection as to that. I do not think you have qualified him to give an opinion as to the tensile strength of tools.

Do you know why the manufacture of this type of device in bronze or brass was discontinued?

The Witness: For several reasons. As we have developed various alloys for the purpose of cutter heads we found alloys which were easier to use and had more strength. That is the prime reason.

Q. (By Mr. Callaway): Now, Mr. Townsend, have you sold any of these same devices made by the Woodworkers Tool Works of Chicago here in Los Angeles?

(Testimony of Jerome B. Townsend.)

A. You have reference to this particular type of head?

Q. Yes. The double one.

A. Yes; two of them.

Q. How long have they been in use?

A. That is a very hard question to answer. Approximately a year and a half.

Mr. Olson: I object to the question and I object to the [219] answer and make a motion to strike, as to what other heads have done.

The Court: I will sustain the objection. We are not concerned with whether he sold a hundred or a thousand. We are interested in what this did, if anything.

Q. (By Mr. Townsend): How much time is required for one to become a joiner in millwork?

Mr. Olson: I object to that question.

The Court: I will sustain the objection. When you asked that question before I did not know what your object was. I can see your object now. You cannot prove incompetency or negligence on the part of the plaintiff in this manner. This man is not your man. He cannot give an opinion as to this man's competency by saying how long it requires to have a man become a joiner.

Mr. Callaway: Well, I thought, your Honor, if a man is——

The Court: No, he is not. I doubt if the evidence is admissible for any reason. I confined myself by saying this man is not qualified to give any

(Testimony of Jerome B. Townsend.)

opinion as to the competency of a man to become a joiner. There is no evidence this man was employed in any special capacity. He was put to work at this. You have pleaded contributory negligence. You have to show that he did something about this job that he should not have done, from which the injury is traced.

You cannot prove it by something that some people required [220] two years before they were put on this machine. Not by this witness, anyway. I will rule this man is not qualified to give an opinion as to how long it takes to become a joiner, to do this kind of work.

Mr. Callaway: That is all.

Cross-Examination

By Mr. Olson:

Q. Mr. Townsend, your job is a salesman?

A. That is right.

Q. How long have you been a salesman?

A. Fourteen years.

Q. You are now a salesman?

A. That is right.

Q. You say you went to the University of——

A. Southern Methodist, in Dallas, Texas.

Q. What did you study there?

A. Business administration.

Q. You didn't study engineering, chemistry or physics? A. No.

The Court: Mechanical engineering?

(Testimony of Jerome B. Townsend.)

The Witness: No.

The Court: You actually never worked with a lathe, or things of that kind?

The Witness: Only as applied to wood.

The Court: Before? [221]

The Witness: After I was out of school.

Q. (By Mr. Olson): Do you have any capacity with the Woodworkers Supply Company except as a salesman? A. No, sir.

Q. Just as a salesman? A. Yes.

Mr. Olson: On that ground alone I would like to move to strike all this man's testimony regarding the policy of the Woodworkers Supply Company.

The Court: Overruled.

Q. (By Mr. Olson): Mr. Townsend, what is an alloy?

A. An alloy is a composite of several metals.

Q. You stated in your direct examination that as we developed steel we found it was better with alloys.

A. I probably should have said that the manufacturers of the supplies we handle had found these alloys——

Q. Your testimony is it is stronger with the presence of alloys? A. It is.

Q. As distinguished from steel without alloys?

A. It is.

Q. Should machinery, in your opinion, machinery used for cutting wood have alloy steel?

(Testimony of Jerome B. Townsend.)

A. It depends on the purpose for which it is being used. [222]

Q. Should that machinery?

A. I beg your pardon?

Q. Should metal used for the purpose for which the metal in this part was to be used have alloy steel in it? A. It could or it could not.

Q. Should it?

A. I couldn't answer that. I say it could or could not.

Q. Would it make it stronger?

A. Not necessarily.

Q. Didn't you just testify that alloy steel is better and made steel stronger? A. It does.

Q. Alloy steel in this part would not make it stronger? A. It would, yes.

Q. When you went out to the Selby Company regarding negotiations for the sale of this raiser head, did you take with you a catalogue?

A. I did.

Q. Did you show it to somebody at the plant there?

A. I believe I showed it to William Walker.

Q. Do you have that catalogue with you?

A. I do.

Q. May I see it?

A. I don't have it here. It is at that bench there [223] (indicating).

Q. Is this catalogue the one you showed Mr. Walker?

(Testimony of Jerome B. Townsend.)

A. It is one like it. It might not have been that particular one.

Q. Did the catalogue you showed Mr. Walker, whether this or another one of its kind, have on it as this, Woodworkers Tool Works? A. Yes.

Q. Catalogue Series K-1945? A. It did.

Q. To your personal knowledge the panel raiser head in question here was shipped from the Woodworkers Tool Works directly to the Selby Company air express? A. Yes.

Q. Do you know whether that part was ever paid for? A. It is not paid for.

Q. Do you know the reason why it wasn't paid for?

A. Well, it failed in that this controversy came up. Whether it was the failure of the head or something else, I don't know. The bill has not been paid.

Mr. Olson: That is all.

Redirect Examination

By Mr. Callaway:

Q. I show you a paper and ask you what it is.

A. This is the original invoice from Woodworkers Tool [224] Works for Woodworkers Supply Company for a Champion panel head.

Q. That is the one sold to the Selby Company?

A. Yes.

Mr. Callaway: I offer this in evidence.

The Court: It may be received.

(Testimony of Jerome B. Townsend.)

The Clerk: Defendant's Exhibit D in evidence.

(The document referred to was marked Defendant's Exhibit D, and was received in evidence.)

Mr. Callaway: That is all.

Mr. Olson: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Have you any other witnesses?

Mr. Callaway: We have other witnesses. I can go forward with the depositions. They are fairly lengthy.

The Court: Will you have other witnesses in addition to the depositions?

Mr. Callaway: Yes. But they are not very long. I think another half hour will take care of it, so far as witnesses are concerned.

The Court: All right. Ladies and gentlemen of the jury, we are about to take a recess to 1:30. The Court admonishes you not to converse among yourselves or with anyone else on any subject connected with the trial, or to form or express [225] an opinion thereon until the cause is submitted to you.

(Thereupon, at 12:10 o'clock p.m., a recess was taken until 1:30 o'clock p.m. of the same day.) [226]

Friday, February 17, 1950

The Court: Let the record show the jury is in the box.

Mr. Olson: May I recall Mr. Townsend to the stand for two questions?

JEROME B. TOWNSEND

recalled as a witness on behalf of the plaintiff, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Olson:

Q. Mr. Townsend, when did you first become aware that the panel raiser head in question here had broken and an injury had occurred?

A. When I was called by the Selby Company.

Q. And did you go over there after that call?

A. Yes, sir.

Q. And did you look at the part?

A. Yes.

Q. Did you or did you not tell either one of the Selbys or Mr. Walker that the part in your opinion was faulty?

A. I don't recall that I did.

Q. Could you have? A. Could I have?

Q. Yes.

A. I certainly could. And I also have said I didn't think so.

Q. You don't remember? A. No.

Q. Do you remember having a conversation about it? A. Yes.

(Testimony of Jerome B. Townsend.)

Q. You remember looking at it? A. Yes.

Q. You don't remember if you made any comment about it being faulty or not?

A. No, I do not. I don't remember whether I did or not.

Q. When you looked at this panel head did you see this blow-hole in the broken part?

A. I did.

Q. Is that the same blow-hole as you see now?

A. As near as I recall, yes.

Mr. Olson: That is all.

Mr. Callaway: Is there anything unusual about steel castings having blow-holes in them?

The Witness: Not that I know of, no, sir.

Mr. Callaway: That is all.

The Court: Step down.

(Witness excused.) [228]

Mr. Olson: Plaintiff rests.

The Court: You rested quite a while ago. This is the defendant's case.

Mr. Olson: Yes. I am sorry.

The Court: Call your next witness.

Mr. Callaway: Mr. Preuer.

ELMER H. PREUER

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Elmer H. Preuer.

(Testimony of Elmer H. Preuer.)

Direct Examination

By Mr. Callaway:

Q. Mr. Preuer, your business or occupation?

A. Machinery supply business.

Q. What firm or style do you do business under?

A. Operating under the name of Woodworkers Supply Company, individual ownership.

Q. Partnership or sole proprietor?

A. Individual ownership.

Q. Who owns it? A. I do.

Q. How long have you been in business? [229]

A. Since 1928.

Q. 1928? A. Yes.

The Court: He is from the concern, or the local concern?

Mr. Callaway: Local concern.

The Court: All right. Go ahead.

Q. (By Mr. Callaway): What relationship do you have with the Woodworkers Tool Works of Chicago?

Mr. Olson: To which I object. It is incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: We buy and sell machinery and supplies, and in our course of business there are certain items that are manufactured by the Woodworkers Tool Works which we sell on a commission basis.

(Testimony of Elmer H. Preuer.)

Q. (By Mr. Callaway): By that do you mean you pay them a certain price?

A. They bill us and we, in turn, bill the customer.

Q. They bill you the wholesale price and you bill the customer the retail price?

A. They would bill us, if an item were \$75.00 they would bill us \$75.00 less 10 per cent.

Q. Do they have any financial interest in the concern? A. Our company?

Q. Yes. [230] A. None whatsoever.

Q. Have they ever had? A. No, sir.

Q. Do you represent any other people who made wood-cutting or working machinery?

A. A hundred accounts.

Q. Beg pardon?

A. About a hundred accounts.

Q. A hundred manufacturers?

A. That is right.

Q. Did your concern sell a panel raiser head to the Selby Company? A. Yes, sir.

Q. Did you bill the Selby Company for that?

A. Yes, sir.

Q. Did, in turn, the Woodworkers Tool Works bill you for it? A. Yes, sir.

Q. Did they give you any instructions as to how you should operate your business or sell that product? A. No, sir.

Q. In other words, the relationship is solely buying from them at wholesale and selling at retail?

(Testimony of Elmer H. Preuer.)

A. That is correct.

Q. It is not unusual, is it, Mr. Preuer, where you place [231] an order for some manufacturer, where you don't carry the item in stock, to have them ship direct to the buyer?

A. That is often done.

Q. It was done in this case?

A. Especially where the customer is in a hurry and requests it to come air express.

Mr. Callaway: That is all.

Cross-Examination

By Mr. Olson:

Q. Mr. Preuer, how often during a given year of business would you say you sell Woodworkers Tool Works products?

A. Well, that is rather irregular. In other words, we may have a half dozen invoices, and none the next.

Q. But you do have a running course of business with them every year? A. That is right.

Q. You are involved in transactions in which the Woodworkers Tool Works sell products at all times, that is, you handle it?

A. Not all of their products.

Q. I say some. A. Some items, yes.

Q. Do you keep a catalogue of the Woodworkers Tool Works in your place of business?

A. Yes. [232]

Q. Your salesmen are equipped with them?

(Testimony of Elmer H. Preuer.)

A. No. We have our office file catalogue which they take out if they feel they need it.

Mr. Olson: That is all.

The Court: If a customer asks for one of their tools, you or the salesman will refer to the catalogue?

The Witness: That is correct.

The Court: So you identify the tool you want?

The Witness: Yes.

The Court: You heard your salesman Mr. Townsend testify this morning?

The Witness: Yes.

The Court: He took the catalogue along with him?

The Witness: Yes.

The Court: He had the catalogue when they gave the order?

The Witness: Yes.

The Court: That catalogue is made by them?

The Witness: Yes.

The Court: By the concern?

The Witness: Yes.

The Court: They turn it over to you for taking orders?

The Witness: Yes.

The Court: You do not put out your own catalogue?

The Witness: No. [233]

The Court: All right.

Mr. Callaway: That is all.

Mr. Olson: That is all.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Callaway: We have the depositions at this time.

The Court: All right.

Mr. Callaway: Do you have any suggestion, your Honor, as to how you want this handled?

The Court: Put your associate on the stand and you ask the questions and he answers. Do not read the argument of counsel. When you come to an objection counsel will make it. Repeat the objection if reservation has been made.

Mr. Callaway: We have only one copy of this.

The Court: I have a copy.

Mr. Callaway: Mr. Olson could read the questions and I will read the answers, and Mr. Lopardo will make the objections.

The Court: Which deposition are you calling for? We have to open them up. You gentlemen are used to having depositions in the State Court where you can look at them. We do not do that with ours. Our depositions are sealed and not opened until the day of the trial.

Mr. Callaway: I am seeking to introduce the depositions [234] of William Victor Knourek and Charles E. Meissner.

The Court: The air mail package is still unopened. I will order the clerk to open it. Those

are the originals that were sent to the clerk of the Court.

Mr. Olson: May I ask if the originals are signed?

The Court: I will have to see.

Mr. Callaway: I am informed they have been. They will speak for themselves.

Mr. Olson: There are two, your Honor.

The Court: Yes. Both of them are signed. The signature of Mr. William Victor Knourek appears on page 79 and the signature of Charles E. Meissner appears on page 189.

If you reserved your objections, you may make any new ones. If you did not, then you cannot make them here.

Mr. Callaway: They were reserved in the stipulation.

The Court: Let us take a look and see. Eliminate the preamble. Let us see what you reserve.

Mr. Callaway: The stipulation is attached to the original. Here is the stipulation regarding that, your Honor, on the original depositions.

The Court: Let us see what it says. There is no reservation of any exceptions.

Mr. Callaway: I thought there was.

The Court: There is no reservation of any exception. Unless they were made there, you cannot make any. [235]

Mr. Callaway: We will note them——

The Court: That applies to both sides.

Mr. Lopardo: It was taken under Rule 26. I thought perhaps if it wasn't admissible in evidence, they could be——

The Court: No. Rule 26 does not say you *can* take a deposition and not reserve, when you are represented by attorneys, both sides, and accumulate a record, and then leave a job to do all over again by the Court. If that were true, I would not have allowed the depositions to be taken. Did I not issue the order of the taking of—

Mr. Lopardo: It is by stipulation.

The Court: An order is necessary. Is not that stipulation signed by me?

Mr. Olson: No.

The Court: You got by with something, then. That is not the rule of the Federal Court. No stipulation is ever filed or has any official standing unless it is approved by the Court. I know most of you do not do it. That is why we keep a stamp saying, "So ordered."

All right. We are wasting a lot of time. Go on and see what objections there are.

Mr. Olson: I am to read the objections on direct and he on cross-examination?

The Court: Yes. You make the objections, if you want to. I do not want them read, because I do not want the [236] wrangling of counsel. I know what counsel do when they are away from the restraint of a Court, before a notary. They make speeches and everything else. I do not want those read.

Mr. Callaway: We are not going to read them.

The Court: I give you warning. I know what attorneys do when they are away from our fatherly care and supervision.

Mr. Callaway: We can start on page 3.

DEPOSITION OF
WILLIAM VICTOR KNOUREK

Mr. Lopardo: "William Victor Knourek, a witness of lawful age, produced on behalf of the defendant and being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and under oath deposed and testified as follows:

"Direct Examination

"Will you state your name, please?"

Mr. Callaway: "William Victor Knourek."

Mr. Lopardo: "And where do you live?"

Mr. Callaway: "At 820 William Street, River Forest, Illinois."

Mr. Lopardo: "And what is your business or occupation?"

Mr. Callaway: "Vice-president in charge of production, of Woodworkers Tool Works, Inc."

Mr. Lopardo: "That is a corporation, is it?"

Mr. Callaway: "It is."

Mr. Lopardo: "And you have been connected with that [237] concern how long?"

Mr. Callaway: "Since 1928."

Mr. Lopardo: "That is an Illinois corporation, is it?"

Mr. Callaway: "It is."

Mr. Lopardo: "And the plant of Woodworkers Tool Works, Inc., is located where?"

Mr. Callaway: "At 222 South Jefferson Street, Chicago 6, Illinois."

(Deposition of William Victor Knourek.)

Mr. Lopardo: "And do you maintain a plant or office anywhere else?"

Mr. Callaway: "We do not.—Pardon me: We have a branch on Adams Street in Chicago, where we manufacture and rebuild woodworking machinery. It is part of Woodworkers Tool Works, Inc.; we just did a little expanding; we have a two-story and four-story warehouse, which we use for rebuilding and manufacturing."

Mr. Lopardo: "Do you know the address on Adams Street?"

Mr. Callaway: "Yes; 610 and 614 West Adams Street. But none of this work was ever done over there."

Mr. Lopardo: "Do you have any place of business outside of Chicago?"

Mr. Callaway: "We do not."

Mr. Lopardo: "And do you have any show rooms, or any employees outside the state of Illinois?"

Mr. Callaway: "We do not; except to the extent we have [238] one salesman that travels."

Mr. Lopardo: "Do you have any salesmen in the state of California?"

Mr. Callaway: "No, sir, we do not."

Mr. Lopardo: "And do you have any place of business in the state of California?"

Mr. Callaway: "We do not."

Mr. Lopardo: "Do you have any agents in the state of California?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "We do not."

Mr. Lopardo: "Is there anyone in California who is authorized to represent your company in a business way?"

Mr. Callaway: "There is not."

Mr. Lopardo: "The Woodworkers Supply Company, do they have any connection with your company?"

Mr. Callaway: "They do not."

Mr. Lopardo: "And have they at any time been authorized to act as your agent?"

Mr. Callaway: "No, sir."

Mr. Lopardo: "Now, Mr. E. H. Preuer of that company, is he employed by your company?"

Mr. Callaway: "No, sir."

Mr. Lopardo: "Then, the only dealings that you have had with the Woodworkers Supply Company is that you have sold them some raiser heads; is that correct?" [239]

Mr. Callaway: "Panel raiser heads, and other tools we manufacture."

Mr. Lopardo: "Those sales, were they made here in Chicago, or elsewhere?"

Mr. Callaway: "The orders were mailed in to us from out of state."

Mr. Lopardo: "And then you delivered the merchandise to whatever carrier they designated, is that correct?"

Mr. Callaway: "That is right."

Mr. Lopardo: "The panel raiser head in ques

(Deposition of William Victor Knourek.)

tion, that was delivered to air freight, is that correct?"

Mr. Callaway: "That is right."

Mr. Lopardo: "And you received an order from Woodworkers Supply Company requesting you to sell them two panel raiser heads, is that correct?"

Mr. Callaway: "That's right."

Mr. Lopardo: "And you delivered them pursuant to their directions to air freight for delivery?"

Mr. Callaway: "I believe we only shipped one air freight; the other one was regular express, if there were two."

Mr. Lopardo: "And then you billed them for these two items, did you not?"

Mr. Callaway: "We did."

Mr. Lopardo: "They were not acting as your agents or servants in making a sale?" [240]

Mr. Callaway: "They were not."

Mr. Lopardo: "And the transaction between you and the Woodworkers Supply Company was merely that of vendor and vendee, of seller and purchaser?"

Mr. Callaway: "That is right."

Mr. Olson: Your Honor, do you want me to read Mr. Johnston's objection that he made, the attorney representing me, or shall I make my own?

The Court: You make the objection.

Mr. Olson: I would like to object to this whole line of testimony for two reasons. All the questions tending to show non-agency are leading and suggestive, and not the proper way to prove the relation-

(Deposition of William Victor Knourek.)

ship. I make a motion to strike all that testimony as having nothing to do with the issues in this case; irrelevant and immaterial. There is no purpose, other than to again raise the question of the jurisdiction of this Court.

The Court: The objection is overruled. I do not want to state the law in advance. I want you jurors to hear the arguments in this case and the instructions about the doctrine which is known as *res ipsa loquitur*, which means a thing speaks for itself.

Certain inferences are drawn as to certain things that happen by means of an instrumentality, which is under the control of a certain party. In order that you understand [241] the application of this doctrine, it is absolutely necessary to understand the relationship of the parties to this transaction. For that reason the relationship of the Chicago concern which is being used here is absolutely important for a proper understanding of the arguments and the instructions to be given you by the Court. That is why the Court is allowing in this testimony as to the relationship, so that the foundation be laid for the instructions the Court is going to give you.

Mr. Lopardo: "What is the relationship between your company and the Woodworkers Supply Company?"

Mr. Callaway: "There is no relationship whatsoever."

Mr. Lopardo: "You did have dealings with them?"

(Deposition of William Victor Knourek.)

Mr. Olson: That is my question.

Mr. Lopardo: Excuse me.

Mr. Olson: May I make this clear to the jury? When I interpose it is Mr. Johnston talking, who was representing Mr. Byrne and myself in this deposition. Mr. Hubbard represented these gentlemen. So when I interpose it is Mr. Johnston, my attorney, talking.

Mr. Lopardo: I want to say, your Honor, there are times here when the attorney representing the plaintiff just cut in and started to ask questions. There is no way of knowing, really. For instance, he starts now, and there are a series of questions that Mr. Johnston asks. [242]

The Court: I am not going to allow that to be done, any cutting in by the other attorney, unless it was by consent. It will not be allowed unless it was by consent.

Mr. Olson: There is no objection to this cutting in.

The Court: That does not make any difference. I will not allow the continuity to be broken.

Mr. Olson: May I go back, then, and ask these questions when I have cross-examination, as though they were on cross-examination?

The Court: Yes. You may go back if they are not asked in cross-examination.

Mr. Olson: Yes.

The Court: Then you may ask them as a part of your showing.

(Deposition of William Victor Knourek.)

Mr. Olson: Yes.

The Court: I do not want to deprive you of the benefit of the questions. I do not want any cutting in by the other attorney.

Mr. Lopardo: The next is over on page 9.

Mr. Callaway: Go ahead.

Mr. Lopardo: About the fifth or sixth line down

Mr. Callaway: All right.

Mr. Lopardo: "The head, where do you obtain that?"

Mr. Callaway: "The casting?"

Mr. Lopardo: "Yes." "What is the head?"

Mr. Callaway: "The head is composed of two parts."

Mr. Lopardo: Mr. Johnston interposes a question at that point.

Mr. Olson: Go ahead. I will get them later.

The Court: Skip that.

Mr. Callaway: Then he goes over to about page 12.

Mr. Lopardo: Page 12. "Is there any other locking device there?"

Mr. Callaway: "The pin locates the top head and on this sleeve we have milled two flats whereb—Whereas we have tapped holes in the second part for tempered hollow head set screws; and these, in turn, are tightened against the flats of the sleeve which is part of part No. 1."

Then I think you go over to about page 14.

Mr. Lopardo: "I will ask to have marked a

(Deposition of William Victor Knourek.)

Defendant's Exhibit No. 1 the panel raiser head, part No. 1 and part No. 2."

Did an exhibit come in from Chicago wrapped under separate cover?

The Court: We received nothing.

Mr. Lopardo: It was sent out with the deposition and on the last page attested there is a stipulation with counsel it may be sent out under separate cover. This is the statement of the notary:

"I further certify that Defendant's Exhibit 1 was produced [244] at, and constitutes a part of, these depositions; and that pursuant to stipulation of the parties, by their respective counsel, the said Defendant's Exhibit 1 is returned under separate cover."

The Court: Well, I will send Mr. Childress to the clerk's office and see if he can find it. Go ahead.

Mr. Callaway: "The part with the long sleeve is part No. 1, the part with the short sleeve is part No. 2."

Mr. Lopardo: "I will ask you, Mr. Kuhn, to mark the lower portion, with the longer sleeve, part No. 1; and the upper portion part No. 2."

"We will let the record show that those portions of the record which have been referred to as Part 1, Part 1 is identified as Part 1 of Exhibit 1; and that part of the record which has referred to as Part 2, that has been marked as Part 2 of Exhibit 1. Is that correct?"

(Deposition of William Victor Knourek.)

Mr. Olson: "Yes."

Mr. Lopardo: "Will you look at this, and tell us what Defendant's Exhibit 1 for identification is?"

Mr. Callaway: "Defendant's Exhibit 1 is a Champion panel raiser head."

Mr. Lopardo: "Is that head from the same lot of steel castings from which the raiser head in question was manufactured?"

Mr. Callaway: "That's right." [245]

Mr. Lopardo: "And from whom were the castings purchased?"

Mr. Callaway: "Gunitite Foundries, of Rockford, Illinois."

Mr. Lopardo: "Of what material is part 1 and part 2 made?"

Mr. Callaway: "Cast steel."

Mr. Lopardo: "And that is purchased from Gunitite Foundries, is that correct?"

Mr. Callaway: "That's right."

Mr. Lopardo: "Prior to this time you used another type of material, is that correct?"

Mr. Callaway: "Before making this head out of cast steel,——"

Then there was an interruption, and another question asked.

Mr. Lopardo: "About how long before it was shipped? If you don't know that, maybe Mr. Meissner will know."

Mr. Callaway: "I could say from three to six months before they were shipped."

(Deposition of William Victor Knourek.)

Mr. Lopardo: "Now, the Gunité Foundries from whom you purchased this, are you familiar with their standing in the trade?"

Mr. Callaway: "They are one of the best in the steel castings business."

Mr. Olson: At this time I would like to object to that question and move the answer be stricken on the ground it has nothing to do with the issues in this case, and is irrelevant [246] and immaterial.

Mr. Lopardo: Your Honor, all we are trying to prove is we exercised due care in purchasing——

The Court: That is not a defense in California. I will sustain the objection. I read the record while we were discussing the matter, the statement of the Supreme Court in the Virtue case. That is Sheward v. Virtue, 20 Cal. (2d) 410. It says there the mere fact you bought from a first-class concern is not material.

Mr. Lopardo: We are not trying to rely on that alone.

The Court: It is not a defense. It is not material at all.

Mr. Lopardo: "You had purchased steel castings from them prior to the lot from which the panel raiser head was manufactured, which was sold to the Woodworkers Supply Company; is that correct?"

Mr. Olson: I would like to also—you didn't answer it?

Mr. Callaway: Make your objection.

(Deposition of William Victor Knourek.)

Mr. Olson: I will make an objection to the question on the same ground.

The Court: The fact they were purchased, I will allow that fact.

Mr. Callaway: "I don't know."

The Court: From whom or what concern, or the standing of the concern is not material. [247]

Mr. Callaway: "I don't know."

Mr. Lopardo: "How long have you purchased from them?"

Mr. Callaway: "I would have to look at my records."

Mr. Lopardo: "I mean, approximately how many years?"

Mr. Callaway: "This could be the only order we ever gave them."

Mr. Lopardo: "Who is in charge of your plant for the manufacture of these raiser heads?"

Mr. Callaway: "Charles Meissner."

Mr. Lopardo: "What is his position?"

Mr. Callaway: "Factory superintendent."

The Court: Just a moment. We will stop right now. We have found the missing box.

Mr. Clerk, will you open it?

You do not need to stop, Mr. Lopardo.

Mr. Lopardo: "And he has direct charge of the shop, is that correct?"

Mr. Callaway: "He has direct charge of the shop and orders all materials he uses for manufacturing tools."

Mr. Lopardo: "And the employees or workmen

(Deposition of William Victor Knourek.)

are under his direct supervision and direction?"

Mr. Callaway: "That's right."

Mr. Lopardo: "I think that is all I have; you may cross-examine."

Mr. Olson: Does your Honor want me to proceed with Mr. [248] Callaway?

The Court: Just a moment. Before we go to cross-examination I think you ought to offer the exhibit.

Mr. Olson: We will have to go back to page 7.

The Court: Counsel may ask the questions so you will be free to make the objections, Mr. Lopardo.

This box contains parts 1 and 2.

Mr. Callaway: We will reoffer them in evidence.

The Court: They may be received as Defendant's exhibits.

Mr. Lopardo: May they be taken out?

Mr. Callaway: May these gentlemen be excused?

The Court: Yes, the men who have just finished.

The Clerk: Is this admitted as Plaintiff's or Defendant's Exhibit?

The Court: Defendant's Exhibit.

The Clerk: That will be Defendant's Exhibits E and F, being 1 and 2, respectively.

(The articles referred to were marked Defendant's Exhibits E and F, respectively, and were received in evidence.)

Mr. Olson: May I see them?

The Court: Yes.

(Deposition of William Victor Knourek.)

Mr. Olson: This has guards on it.

Mr. Callaway: To keep you from getting cut, it has guards on it. Or, rather, it doesn't have the blades in, or something. [249]

Mr. Lopardo: It has the blades in it.

The Court: We will not stop to comment. Nobody is testifying.

Mr. Olson: Referring you back to page 7, where these interruptions were made in the form of cross-examination I will be Mr. Johnston now.

Cross-Examination

"You did have dealings with them?"

Mr. Callaway: "As far as selling tools, yes. When tools are sold by other dealers in the country we extend them a courtesy discount, whereas they buy this tool from us and resell it."

Mr. Olson: "Was that the arrangement between you and the Woodworkers Supply Company?"

Mr. Callaway: "That is right."

Mr. Olson: "I mean, did they buy from you?"

Mr. Callaway: "They bought from us; we billed them and they, in turn, billed the customer. I believe we allow them a 10 per cent commission."

Mr. Olson: "Wasn't it Woodworkers Supply Company, out there in Los Angeles, that placed this order?"

Mr. Callaway: "That's right."

Mr. Olson: "At 1222 Santa Fe Avenue, Los Angeles?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "I don't know their street address."

Mr. Olson: "I am not trying to mislead you, but my information in my file shows that Woodworkers Supply Company, [250] 1222 Santa Fe Avenue, Los Angeles, took the original order on this."

Mr. Callaway: "They did; and they mailed the order to us."

Mr. Olson: "And just for the sake of the record, that was for a panel raiser head manufactured by you, which was listed in your 1945 K catalog; that is your catalog, put out by your company, Woodworkers Tool Works, Inc., isn't that correct?"

Mr. Callaway: "That's right."

Mr. Olson: "And that had a 1 $\frac{1}{4}$ inch bore, right hand; is that correct?"

Mr. Callaway: "The panel raiser head in question?"

Mr. Olson: "Yes."

Mr. Callaway: "I don't know the bore size on it. 1 $\frac{1}{4}$ inch bore, is correct."

Mr. Olson: "And then 1 $\frac{1}{4}$ inch bore, right hand, Champion panel raiser head correctly describes the raiser head in question here?"

Mr. Callaway: "That is right."

Mr. Olson: "And that was manufactured by your company?"

Mr. Callaway: "Yes, sir."

Mr. Olson: "I mean the raiser head in question here was manufactured by your company?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "That is right." [251]

Mr. Olson: "The whole thing is the head, isn't it?"

Mr. Callaway: "The head is composed of two parts."

Mr. Olson: "Would you please state what the head consists of; just describe it briefly?"

Mr. Callaway: "All right: The head consists of two parts, the bottom part having three fingers in the shape of a star fish; and these, in turn, have high-speed steel knives fastened to them by two three-eighths inch case-hardened cap screws."

Mr. Olson: "By 'bottom part,' you are referring to the one which fits immediately on the spindle?"

Mr. Callaway: "It goes on the spindle, yes."

Mr. Olson: "And the other part fits over that; is that correct?"

Mr. Callaway: "The other part fits over it in such a manner that when the two pieces are put together they are in a staggered position."

Mr. Olson: "Now, just for the sake of the record, the second part, as you call it, also has three arms, upon which three knives are mounted?"

Mr. Callaway: "That's right."

Mr. Olson: "And the three arms and the three knives are substantially similar to those on the first part?"

Mr. Callaway: "That's right."

Mr. Olson: "And the second part fits over the

(Deposition of William Victor Knourek.)

first so [252] that between the two there are six arms and six knives mounted thereon, is that correct?"

Mr. Callaway: "That's right. The second part of this panel raiser head fits over the sleeve which is part of the first part."

Mr. Olson: "And the first part is mounted directly on the spindle of the machine on which the unit is operated, is that correct; that is, on which the head is operated?"

Mr. Callaway: "They both operate on the machine together."

Mr. Olson: "Yes, but the second one is mounted on the first part?"

Mr. Callaway: "Yes, by two hollow head set screws which are tightened against the flats which are milled on the sleeve which is part of the first part of the panel raiser head. The reason for this keyway (indicating) is that if the two parts were indexed the same the knives would strike each other."

Mr. Olson: "What do you mean by 'indexed the same'?"

Mr. Callaway: "If these were just like that, (indicating) one on top of another. This head is not supposed to be run this way at all, (indicating) it cannot be run that way."

Mr. Olson: "That is, if the knives were exactly opposite each other when mounted on the spindle, that is what you mean? They are exactly opposite each other now." [253]

(Deposition of William Victor Knourek.)

“This whole unit is the head, is that correct?”

Mr. Callaway: “That’s right.”

Mr. Olson: “Then we can agree, can we, that the correct mounting of these two parts of the panel raiser head in question is to have the knives staggered so that instead of the two knives being directly opposite each other on the spindle shaft they are so mounted by means of the set screw that you mentioned——”

Mr. Callaway: “Keyway.”

Mr. Olson: “All right, the keyway—that one knife on one part is halfway between the position of the two knives of the other part; is that correct?”

Mr. Callaway: “So far, yes.”

Mr. Olson: “Go ahead, if there is any explanation.”

Mr. Callaway: “With that we have a slotted keyway in the sleeve of part No. 1——”

Mr. Olson: “Which is mounted immediately upon the spindle, is that right?”

Mr. Callaway: “That’s right.”

Mr. Olson: “Now, go ahead.”

Mr. Callaway: “And we have a pin on the second part——”

Mr. Olson: “You mean a set screw?”

Mr. Callaway: “No, there is no set screw at all; it is a pin.”

Mr. Olson: “Oh, yes; that fits in the slot?”

(Deposition of William Victor Knourek.)

Mr. Callaway: "Yes."

Mr. Olson: "Fits in the slot so that the adjustment will always be correct?"

Mr. Callaway: "No, this is done so that the head can be put together only one way; and if the head is not put together with this pin in the slotted key-way the head cannot be used."

"The pin locates the top head, and on this sleeve we have milled two flats whereby——"

Mr. Olson: "The two flats being the two flat spaces milled on the shaft at about one-third of the way around the shaft, each one of them, the other third being represented by the slot; about one-third way around is one milled flat, and about one-third way around again is another milled flat; is that right?"

Mr. Callaway: "Yes. Whereas we have tapped holes in the second part for tempered hollow head set screws; and these, in turn, are tightened against the flats of the sleeve which is part of part No. 1."

Mr. Olson: "The set screw being in part No. 2."

Mr. Callaway: "Yes, sir."

Mr. Olson: "All right."

Mr. Callaway: "These set screws are locked when the desired height of part No. 2 is made."

Mr. Olson: "Pardon me: Desired height or distance [255] away from part No. 1, is that right?"

Mr. Callaway: "That's right."

Mr. Olson: "We have been talking about the lower part and the upper part; and all you mean

(Deposition of William Victor Knourek.)

by that is that the so-called lower part is the one which is over-all larger, and is mounted directly on the spindle?"

Mr. Callaway: "On the shaper spindle."

Mr. Olson: "And the so-called second part, or upper part, is the one which is upper in the assembly; or in other words, which goes over the first part."

Mr. Callaway: "That's right."

Mr. Olson: Now we go to page 15, Mr. Callaway.

"You are now referring to Defendant's Exhibit 1 for identification?"

Mr. Lopardo: "Yes."

Mr. Callaway: "Cast steel."

Mr. Olson: "Will you put in the record the date when the particular panel raiser head in question was made, and when the castings for it were made, if this witness knows?"

Mr. Callaway: "I don't know that."

Mr. Olson: "And they were shipped in the latter part of October, 1948, is that correct?"

Mr. Callaway: "It was shipped air express October 23, 1948, invoice dated October 25, 1948, our invoice B 67519, direct to Selby Company, 1101 West Victory Boulevard, Burbank, [256] California."

Mr. Olson: "May I see it, please?"

Mr. Callaway: "You may."

Mr. Olson: Page 17. "You are now talking about the castings used in this particular Champion panel raiser head which is in question here?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "That is right."

Mr. Olson: Now we go to cross-examination.

"Now, Mr. Knourek, will you please tell me, do I understand correctly that when this unit, the Champion panel raiser head is mounted, for instance, on a double spindle shaper the two arms, I mean the two sets of three arms each are mounted opposite each other but in a staggered fashion, as you have already described; and the wood upon which the cutting operation is being performed runs between them; is that correct?"

Mr. Callaway: "That is right."

Mr. Olson: "What is the usual speed at which such a head is operated, under proper operating conditions?"

Mr. Callaway: "The head can be operated from 3,000 to 7,200 revolutions per minute."

Mr. Olson: "Can it go as high as 10,000?"

Mr. Callaway: "I can see no reason why it could not be run at that speed."

Mr. Olson: "But ordinarily it is 7,200, is that right?" [257]

Mr. Callaway: "Yes, sir. Speed is used for nothing more than a smooth cut, so that sanding operations are not needed after the operation is performed."

Mr. Olson: "That is, the higher the speed, up to the reasonable limits of operation of the tool, the smoother the cut; is that correct?"

Mr. Callaway: "That is right; but the way the head is made, with a shear cut, it will cut at 3,000

(Deposition of William Victor Knourek.)

revolutions per minute and do a very smooth job.”

Mr. Olson: “But it will do a somewhat smoother job at higher speeds; is that correct?”

Mr. Callaway: “That is questionable, sir; I would have to have two machines here and show that to you.”

Mr. Olson: “Now, you say that Defendant’s Exhibit 1 for identification, that the cast steel casting of which part No. 1 and part No. 2, that we have been talking about here, were made is from the same lot of steel castings as the casting used in the Champion panel raiser head in question in this suit?”

Mr. Callaway: “That is right, sir.”

Mr. Olson: “How do you know that it is the same casting; you didn’t keep any record of it at the time, did you? I mean, you didn’t mark this particular casting, or part of the casting, and mark the part that was shipped out to California, so that you know that they are both from the same [258] batch of steel castings, did you?”

Mr. Callaway: “We did not.”

Mr. Olson: “You are just depending on your memory?”

Mr. Callaway: “No; we ordered a certain amount of castings at that time, and I believe the number of castings ordered at that time from this company was 50. Of that lot we still have three or four castings left.”

Mr. Olson: “Now, you did buy castings from other companies at about the time you ordered these

(Deposition of William Victor Knourek.)

castings from this company out in Rockford,—what was the name of the company?"

Mr. Callaway: "Gunitite."

Mr. Olson: "——Gunitite, isn't that right?"

Mr. Callaway: "Not this type of casting."

Mr. Olson: "Didn't you ever order this type of casting from any other company?"

Mr. Callaway: "We have; in fact, we have another order of castings with another company at this time. We always order our castings ahead."

Mr. Olson: "Now, the invoice number, by the way, on the shipment of this particular Champion panel raiser head in question, your invoice number is B 67519; is that correct?"

Mr. Callaway: "It is."

Mr. Olson: "And aside from the casting used in that panel raiser head, you manufactured or fabricated all the other parts; [259] is that correct?"

Mr. Callaway: "We have."

Mr. Olson: "Now, parts No. 1 and No. 2, meaning that part No. 1 is the part that fits directly over the shaft, and which consists of a bore through a sleeve at the end of which sleeve there are mounted three arms, on each of which arms is mounted a cutter with an adjustable blade and two bolts to hold the cutter in place on the arm; is that right?"

Mr. Callaway: "That is a knife."

Mr. Olson: "I call it a cutter, you call it a knife?"

Mr. Callaway: "That's right."

(Deposition of William Victor Knourek.)

Mr. Olson: "This is all cast in one piece, the three arms and the sleeve."

Mr. Callaway: "That is right."

Mr. Olson: "And unit is made of what kind of steel?"

Mr. Callaway: "The main castings are made out of cast steel, and the knives are made out of high-speed steel."

Mr. Olson: "The knives, however, are separate; they are separate items, they are not part of the original casting?"

Mr. Callaway: "No, they are not."

Mr. Olson: "But the arms and the sleeve are all one casting and all one material; that is cast steel, is that correct?" [260]

Mr. Callaway: "That is right."

Mr. Olson: "This particular unit; that is, this Champion panel raiser head in question in this suit was designed by your company?"

Mr. Callaway: "That is right."

Mr. Olson: "And your heads are sold throughout the United States, including California, and you sold this one in California, didn't you?"

Mr. Callaway: "That is right."

Mr. Lopardo: "He didn't sell it in California."

Mr. Olson: "Well, it was sold to a customer in California."

Mr. Lopardo: "That is right."

Mr. Olson: "How do you sell your Champion panel raiser heads?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "We advertise them in our catalog, and they are advertised in all the national woodworking magazines."

Mr. Olson: "And this particular type of Champion panel raiser head was listed and was advertised in your 1945 catalog, Series K; isn't that correct?"

Mr. Callaway: "That is correct."

Mr. Olson: "And that catalog bore on its face, or within, the name of your company, Woodworkers Tool Works, Inc., 222 South Jefferson Street, Chicago, Illinois; is that correct?" [261]

Mr. Callaway: "That is right, sir."

Mr. Olson: "And the order for the particular Champion panel raiser head in question, you say, was taken or received by you from Woodworkers Supply Company; and you were directed by them to ship it to the Selby Company, 1101 West Victory Boulevard, Burbank, California; is that correct?"

Mr. Callaway: "That is right."

Mr. Olson: "And the Woodworkers Supply Company address was then 1222 Santa Fe Avenue, Los Angeles, California?"

Mr. Callaway: "That is correct."

Mr. Olson: "I note that your invoice shows the address at 1222 Santa Fe Avenue, Chicago, Illinois; but that is just a stenographer's error, isn't it?"

Mr. Callaway: "It is, sir."

Mr. Olson: "Are you familiar with the double spindle shaper manufactured by C. O. Porter Company, Grand Rapids, Michigan, Model 6?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "I have a general idea what that machine is, and what it looks like; they are all alike."

Mr. Olson: "And your Champion panel raiser head can be mounted and will operate properly on that double spindle shaper made by the Porter Company, will it not?"

Mr. Callaway: "If their spindle is long enough, yes."

Mr. Olson: "Well, now, you have no personal knowledge or recollection of the particular Champion panel raiser head [262] in question, do you; you don't remember that particular one, out of all those you made?"

Mr. Callaway: "I do not."

Mr. Olson: "Who is your agent for selling these particular Champion panel raiser heads, or any other articles made by you, in California?"

Mr. Callaway: "We have no agents in California."

Mr. Olson: "No one at all?"

Mr. Callaway: "Nowhere in the United States or Europe, do we have any agents."

Mr. Olson: "You do not maintain or keep any manufacturers' agents, so-called?"

Mr. Callaway: "We do not."

Mr. Olson: "Nor factory representatives?"

Mr. Callaway: "No, sir."

Mr. Olson: "You have only a salesman?"

Mr. Callaway: "Where?"

(Deposition of William Victor Knourek.)

Mr. Olson: "Well, I understood you to say that a while ago."

Mr. Callaway: "We have a salesman—our salesman works out of our Chicago office, which is the only office we have."

Mr. Olson: "And does he travel in California?"

Mr. Callaway: "He does not; he travels the state of Illinois——"

Mr. Olson: "You solicit orders, then, through the use of [263] a catalog, throughout the United States; is that correct?"

Mr. Callaway: "We do."

Mr. Olson: "And in the particular instance in question, I am talking about the sale now of this particular Champion panel raiser head, that order came to you from the Woodworkers Supply Company in Los Angeles?"

Mr. Callaway: "That is right."

Mr. Olson: "And did you sell the item to them, or did you sell it to the Selby Company?"

Mr. Callaway: "I sold the item to the Woodworkers Supply Company."

Mr. Olson: "Did you bill them?"

Mr. Callaway: "I did."

Mr. Olson: "Did they pay for it, or did the Selby Company pay for it?"

Mr. Callaway: "I am pretty sure that head is not paid for as yet; they are holding it up; but they have paid for other heads they have since ordered."

Mr. Olson: "Whom do you mean by 'they'?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "Woodworkers Supply Company."

Mr. Olson: "Didn't Woodworkers Supply Company inform you that they considered this head defective?"

Mr. Lopardo: I object to that on the ground it is immaterial and irrelevant and does not tend to prove or disprove any issue in this case. [264]

The Court: Objection sustained.

Mr. Olson: "Well, on what basis, then, did they refuse to pay for it?"

Mr. Callaway: "They refused to pay for the head because of this trouble they had; but I don't recall them saying the head was defective."

Mr. Olson: "They never informed you that it was defective?"

Mr. Callaway: "Let me see my records:—"

Mr. Olson: "Before you look at you records, do you have any independent recollection of whether they ever informed you that this head was defective?"

Mr. Callaway: "Well, they must have said something to that effect."

Mr. Olson: "It has now been fifteen months since you shipped the head, hasn't it?"

Mr. Callaway: "That is why I am not sure."

Mr. Olson: "Well, were you ever informed by anyone at Selby—"

Mr. Lopardo: Just a moment. You skipped an objection. Your Honor, we object to all this mate-

(Deposition of William Victor Knourek.)

rial since the last time I objected on the ground it is immaterial. It don't tend to prove or disprove anything in the case. We make the motion that testimony be stricken. It was given after our objection was sustained. At that time, of course, they had [265] no way of ruling on it.

The Court: Well, there is no objection before the court as to the subsequent questions.

Mr. Lopardo: There is now, your Honor. It is in the record. Mr. Hubbard made it at that time. I am repeating it right now, as to all the previous questions.

The Court: All right. The motion will be granted.

Mr. Olson: "Well, were you ever informed by anyone at Selby that the head was defective, or did they ever claim that it was defective?"

Mr. Callaway: "I don't know."

Mr. Olson: "Can you look at your records and tell?"

Mr. Callaway: "Yes, if I have something in writing to look at; that is fifteen months ago, I can't remember."

Mr. Olson: "Look at the record, then."

Mr. Lopardo: Your Honor, that is following along the same line.

The Court: I will sustain the entire objection.

Mr. Olson: I will go on and check over this a minute.

The Court: I will sustain the objection to any inquiry about any complaint.

(Deposition of William Victor Knourek.)

Mr. Olson: I think we can start further down on page 27. Is that satisfactory?

Mr. Callaway: You can start there, and we will see.

Mr. Olson: It is off the subject. [266]

Mr. Lopardo: Go ahead.

Mr. Olson: I think that gets out of that field. The middle of page 27.

“Did you have anybody make an investigation of this particular head in question here, to determine whether it was or was not defective, after the claim came up that it was defective.”

Mr. Callaway: “We had nobody over to examine the head.”

Mr. Lopardo: I object to that. It is immaterial. It doesn't tend to prove or disprove anything as to whether this one particular head was defective at the time it was shipped. I make a motion to strike it on that ground.

The Court: I think the objection is good because it is not cross-examination.

Mr. Olson: This is cross-examination.

The Court: It is not proper cross-examination.

Mr. Olson: I see.

The Court: The man was not asked to testify as to any inspection. That is, unless you are making him your own witness. He testified very simply. I do not know what your lawyer did to spread this over 189 pages. He was trying to prove something that was not asked on direct examination. If you

(Deposition of William Victor Knourek.)

want to offer it as a part of your proof, all right.

This Mr. Knourek was asked one thing, the origin of this. [267] I allowed it only to the extent of his saying he bought it from another concern. That is all he testified to. The rest of it is absolutely not proper cross-examination.

Mr. Olson: I am checking now.

The Court: I realize that lawyers, when taking depositions, want to put in everything that a lawyer will need.

Mr. Olson: May I read this, and make him my witness on direct?

The Court: Not now. You can offer that later on as part of direct, part of your proof on rebuttal.

Mr. Olson: That is what I will do.

The Court: We have to keep the continuity of this case and see where we stand. Any portion of the deposition that is taken out as not proper at this time, you may reoffer it and then they may object, upon other grounds.

Mr. Olson: I see. Then let's see how far we skip here. That is an objection down to page 27. There is no objection after page 29. Starting at page 29——

Mr. Lopardo: At the bottom of page 28 he makes that objection.

Mr. Olson: That is after that objection. That isn't an objection to the testimony going on later. On page 29, Mr. Callaway:

"Is there anybody with your company that has any direct knowledge,—that was the question."

(Deposition of William Victor Knourek.)

Mr. Callaway: "Oh, no, sir."

Mr. Olson: "I am talking about the head now."

Mr. Callaway: "No, sir."

Mr. Olson: "They have no direct knowledge, as far as you know?"

Mr. Callaway: "We did not see it at all, and we have not seen it to this day, the head itself."

Mr. Olson: "When you obtained these castings from the Gunitite Company of Rockford, what tests did you make of the castings, any,—or your company?"

Mr. Callaway: "I think that should be answered by my superintendent."

Mr. Olson: "Well, do you know?"

Mr. Callaway: "I don't know."

Mr. Olson: "Were any tests made; do you know that?"

Mr. Callaway: "I don't know."

Mr. Olson: "What inspection did you make of those heads and castings?"

Mr. Callaway: "That can be answered by my superintendent also."

Mr. Olson: "Can you not answer?"

Mr. Callaway: "Well, I can say that that head, during the process of manufacturing, was inspected at least seven or eight times."

Mr. Olson: "Not by you, however, or your company?" [269]

Mr. Callaway: "I don't know whether I inspected that head, or not."

(Deposition of William Victor Knourek.)

Mr. Olson: "Did anybody with your company inspect it?"

Mr. Callaway: "Yes."

Mr. Olson: "Who was that?"

Mr. Callaway: "Well, our superintendent."

Mr. Olson: "You don't know that of your own personal knowledge, do you?"

Mr. Callaway: "I do."

The Court: This man is putting up a strawman and knocking him down, trying to ask the man if he inspected it. He said, "No, my superintendent inspected it."

He said, "Then you did not do it?"

You are wasting a lot of time.

Mr. Olson: "You were there when he inspected them?"

Mr. Callaway: "No, but he has strict orders to inspect every manufactured product that leaves our shop."

Mr. Olson: "But you don't know whether he carried out those orders in the case of this particular casting, do you,—yes or no, please?—Well, if you were not there, there is no way you can know."

Mr. Callaway: "That is right; I would not know."

Mr. Olson: "Now, it was your custom or practice to make tests and to make inspections; but you don't know what tests and what inspections were made in this case?" [270]

Mr. Callaway: "That is right."

(Deposition of William Victor Knourek.)

Mr. Olson: "Now, what would the inspection or tests that are ordinarily made reveal, of the castings, I mean?"

Mr. Callaway: "If the casting is defective we can see it immediately, when it comes in its rough state; and if there are any defects we can also tell later, when we start making cuts on the casting."

Mr. Olson: "By cuts you mean machining?"

Mr. Callaway: "Machining; yes, sir."

Mr. Olson: "And the machining is done to smooth the casting up, is it?"

Mr. Callaway: "That is right, sir."

Mr. Olson: "Machining, in layman's language, means shaping it up in the form that you desire?"

Mr. Callaway: "That is right."

Mr. Olson: "And you can tell by your inspection and your tests whether it is a sound casting; is that correct?"

Mr. Callaway: "Most of the time we can."

Mr. Olson: "And what are the tests and inspections given to castings by your company?"

Mr. Callaway: "I think my foreman should answer that."

Mr. Olson: "Don't you know?—We are not taking his deposition now."

Mr. Callaway: "I know that he is running my shop, and I hold him responsible." [271]

Mr. Olson: "What we are trying to find out is what you know."

Mr. Lopardo: That is objected to.

(Deposition of William Victor Knourek.)

The Court: I will sustain the objection, the whole line of argument. He is badgering a man because he says he does not know. The next deposition is of the superintendent?

Mr. Lopardo: That is right.

Mr. Callaway: Yes.

Mr. Lopardo: He is the expert.

Mr. Olson: "Well, he said there were tests made; and if there were tests, he should know what they are."

Mr. Callaway: "What tests he made, I don't know,—about his examinations; I know they were examined."

Mr. Olson: "By examined, you mean inspected?"

Mr. Callaway: "Inspected."

Mr. Olson: "What is the character of that inspection; what did he look for?"

Mr. Callaway: "Defects, flaws, size and appearance, dimensions, whether or not the tool is complete."

Mr. Olson: "Now, with respect to defects in the castings, what would such an inspection or examination reveal?"

Mr. Lopardo: There is an objection on the ground it has already been covered; asked and answered.

The Court: The objection is sustained, in view of the fact the witness stated he did not make the inspection and [272] does not know. Also, because the witness did not make the inspection you are

(Deposition of William Victor Knourek.)

wasting the court's time, having a man ask fifty questions to which the witness says he does not know.

Mr. Olson: Starting on page 33, "Then what could be seen by your inspection, in the way of defects?"

Mr. Callaway: "Well, a crack in the casting."

Mr. Olson: "Porosity?"

Mr. Callaway: "Porosity."

Mr. Olson: "Blow-holes?"

Mr. Callaway: "Blow-holes."

Mr. Olson: "Segregation of the metals?"

Mr. Callaway: "No."

Mr. Olson: "That could not be seen by the naked eye?"

Mr. Callaway: "You would not have any segregation of the metal in a casting; it is poured hot and it just flows together."

Mr. Olson: I am not going to read that.

Mr. Lopardo: I was going to object to it.

Mr. Olson: There is no sense in it. The top of page 35.

"You know, do you not, that a defective casting which had in it a blow-hole or an excess of silicon or phosphorus or sulphur would be liable to break or disintegrate when operated at high speed, do you not?"

Mr. Callaway, that is the top of page 35.

Mr. Callaway: I am looking at it.

Mr. Olson: Pardon me.

(Deposition of William Victor Knourek.)

“If it had one of those defects it would be apt to break?”

Mr. Callaway: “No.”

Mr. Olson: “It could break?”

Mr. Callaway: “Yes.”

Mr. Olson: “And it would be more apt to break if it had one of those defects than if it had none of those defects; isn’t that correct?”

Mr. Callaway: “That is correct.”

Mr. Olson: “Of course, in all of these questions I have been talking about a casting from which one of your Champion panel raiser heads was made; you understand that?”

Mr. Callaway: “I do, sir.”

Mr. Olson: I won’t ask that.

Mr. Lopardo: Your Honor, he asks the same question about another technical matter, that a blow-hole is a void, and I object.

Mr. Olson: That is the purpose——

Mr. Lopardo: I want to bring before the Court——

Mr. Olson: I haven’t asked it. I understand it would [274] be sustained. There is no sense in taking the Court’s time.

Page 37, Mr. Callaway.

Mr. Callaway: All right.

Mr. Olson: “It was not the practice of your company, at the time the particular panel raiser head in question was made, to conduct tests of the castings for either blow-holes, or voids, or gas pockets; is that correct?”

(Deposition of William Victor Knourek.)

Mr. Lopardo: I will object to that question on the ground it is a multisided question. It doesn't ask for one answer, but several. On the further ground it is not within the scope of direct examination.

The Court: Objection sustained.

Mr. Olson: He testified on direct examination about castings, your Honor, and holes in them.

The Court: No, he did not. The cross-examiner starts to ask him and then cross-examine him about his own questions. That is not proper cross-examination.

Mr. Olson: I will get it on the direct. This is sort of awkward. Page 38.

"Then, do I understand correctly that at the time the Champion panel raiser head was manufactured by your company you made no tests or examinations, other than those for blow-holes?"

Mr. Lopardo: I object. That is not what the witness [275] testified to. It wasn't testified on direct examination, and it is beyond the scope of direct.

Mr. Olson: I asked if he understood that was the question.

Mr. Lopardo: The question is improper. It doesn't make any difference if the witness understood it or not, your Honor.

The Court: Yes. The objection is sustained.

Mr. Olson: At the bottom of page 38.

"And you relied upon the tests and inspections made by the foundry?"

(Deposition of William Victor Knourek.)

Mr. Lopardo: Your Honor——

Mr. Olson: There is no objection in the record.

Mr. Lopardo: Just a minute. You are starting out in the middle of a page here, without any——

Mr. Olson: I will read back, then, if you want me to, without objection.

Mr. Lopardo: No. Your Honor, none of this matter is within the scope of the direct examination. The objections have been sustained repeatedly.

The Court: I will sustain the objection. It is quite apparent the cross-examiner was building up a case, to show this man relied on something. That is not the case before us.

Mr. Olson: I can take that on rebuttal. [276]

The Court: You will try to. After all, a man has a right to rely on his superintendent for inspections.

Mr. Olson: All I want to know, your Honor, is do I get a chance to read this on rebuttal, the part that we are not reading now?

The Court: All right.

Mr. Olson: I don't care when it is read. It looks like I will have to read it all on rebuttal.

Mr. Lopardo: Go to page 60.

Mr. Olson: I will read it all on rebuttal and save all these objections.

The Court: By your making the statement and my not answering, I am not stating you will be allowed to, if objection is made. I do not want you to——

(Deposition of William Victor Knourek.)

Mr. Olson: As I understand your Honor, so we understand——

The Court: I have already ruled there is nothing to understand, no understanding at all.

Mr. Olson: I don't understand the ruling.

The Court: I am merely ruling on objections. I am not asking you to stop, if you do not want to stop. If you want to stop, stop. Do not stop and give me a ground I may not approve of.

Mr. Olson: I don't mean to do it. I had better go on. I don't want to stop then. We will just go on.

Mr. Callaway: What page? [277]

Mr. Olson: I am just trying to find out. Page 39.

The Court: If objections are made in the record and I sustain them, I am not going to let you bring that in as part of your case. I want you to know that. That is not the rule.

In other words, that is excluded, as though I had not heard it. You are not going to be allowed to bring it back and say you want it as part of your case.

Mr. Olson: No. What I want to do, if you sustain the objections now, I understand it is because it is outside the realm of cross-examination, but if that witness were here I would have the chance to——

The Court: He was subject to subpoena. You could have brought him here.

Mr. Olson: New York.

(Deposition of William Victor Knourek.)

The Court: The subpoena of this court extends to every part of the United States.

Mr. Olson: As I understand your Honor to have told me earlier, when we were on page 27, it was that if I wanted to bring that in on rebuttal that it was all right.

The Court: Subject to exceptions. I am not making rulings in advance.

Mr. Olson: I know.

The Court: I am not making rulings in advance. If they do not object to it, I will rule on it at the time. [278]

Mr. Olson: We had better go on. I want to get as much of this in as I can.

The Court: Go ahead.

Mr. Callaway: Could I get a drink of water?

Mr. Olson: I would like one, too.

The Court: To correct the record, I want to say that that statement was made in conjunction with the cutting in questions, and not with these other questions. I could not bind these defendants by erroneous testimony that has been brought in which I have not allowed. I am not supposed to even see it, to see what it is.

Mr. Olson: You mean the cutting in questions on direct?

The Court: Those are the only ones.

Mr. Olson: We will have to go on and take the objections as they arise.

“No, maybe I don’t make it clear: Were the

(Deposition of William Victor Knourek.)

castings; that is, the metal that was in the castings, they were bought by you from Gunité Foundries, isn't that right?"

Mr. Callaway: "Yes, sir; we sent our pattern down to the Gunité Foundries and wanted so many castings made of each pattern, of a certain type of steel, which was specified on our order."

Mr. Olson: "Did you have your own foundry at the time you made up this Champion panel raiser head in question?"

Mr. Callaway: "No." [279]

Mr. Olson: "Did your company ever have its own foundry?"

Mr. Callaway: "Never."

Mr. Olson: "And your company never X-rayed or magnafluxed the castings from which this particular Champion panel raiser head was made; is that correct?"

Mr. Callaway: "No, sir."

Mr. Olson: "Do you know whether an open hearth or an electric furnace was used in casting these particular castings in question?"

Mr. Callaway: "I don't know."

Mr. Olson: "Do you know what was the method of casting these particular castings?"

Mr. Callaway: "I don't know."

Mr. Olson: "You don't know whether steel molds or centrifugal casts were used?"

Mr. Lopardo: I am going to object on the ground none of this is competent. It is not material.

(Deposition of William Victor Knourek.)

The Court: Objection sustained.

Mr. Lopardo: I make a motion to strike all of it for that reason.

Mr. Olson: "Do you know what the exact procedure was that was employed by the Gunitite Foundries in making this particular casting?"

Mr. Callaway: "No."

Mr. Olson: "You don't know what heat treatment they used?" [280]

Mr. Lopardo: I object on the ground it is immaterial.

The Court: The objection is sustained.

Mr. Olson: "Who did the machining of this particular panel head in question?"

Mr. Callaway: "That should be answered by my foreman."

Mr. Olson: "Would your company do it, or some other company?"

Mr. Callaway: "Our company manufactured the entire head, from the casting which we purchased."

Mr. Olson: "And did the machining?"

Mr. Callaway: "We did."

Mr. Olson: "Now, isn't it a common occurrence in machining this type of casting to find blow-holes?"

Mr. Callaway: "Very uncommon."

Mr. Olson: "What is done with the casting when blow-holes are discovered?"

Mr. Callaway: "They are immediately thrown on the junk pile."

(Deposition of William Victor Knourek.)

Mr. Olson: Page 42, Mr. Callaway.

“Are the blow-holes easily discovered after the casting is machined?”

Mr. Callaway: I haven’t found it.

Mr. Olson: Page 42, about three or four lines down.

Mr. Lopardo: I object to that, your Honor, on the ground it is not within the scope of direct examination. [281]

The Court: Yes. The objection will be sustained.

Mr. Olson: “After assembling the panel head; that is, after placing the knives in proper position on the casting, and assembling the entire panel head, what tests or inspection are made on the whole assembled unit before it is sent out to be sold?”

Mr. Callaway: “We have several different inspections that this head goes through from the time we receive and check in the casting until the time it leaves our shipping room.”

Mr. Olson: “Will you describe those?”

Mr. Callaway: “The castings come in and they are weighed and counted, examined by one of the receiving clerks. The castings are then taken to the third floor of our shop, turned over to our foreman, Mr. Meissner; and he, in turn, checks the weight and enters that on the carbon copy of the order he ordered this merchandise with.”

Mr. Olson: “You are talking now about the order for the casting?”

Mr. Callaway: “Yes.”

(Deposition of William Victor Knourek.)

Mr. Olson: "What is the significance of the weight of the casting?"

Mr. Callaway: "No significance whatsoever."

Mr. Olson: "Then, why is the weight taken?"

Mr. Callaway: "We buy this by the pound."

Mr. Olson: "How long have you been in the particular [282] line of work that you are in now?—I understand that is the manufacture of machine tools, including, among others, the Champion panel raiser head; is that right?"

Mr. Callaway: "Yes, sir; I have been connected with Woodworkers Tool Works since 1928; during which time I worked in all the departments of the shop, having a thorough knowledge of all operations which take place in the manufacturing of our tools."

Mr. Olson: "Including, I assume, the inspection and examination of the tools after they are finished; is that right?"

Mr. Callaway: "Yes, sir."

Mr. Olson: "And you know, do you not, that if a casting contains blow-holes, and that casting is used in the making of a panel raiser head, that during the ordinary operation of the raiser head a blow-hole is apt to cause the raiser head to explode or disintegrate, do you?"

Mr. Callaway: "No, sir; I do not. We have made holes in castings larger than those caused by blow-holes, and giving them a great deal of abuse, trying to break off those prongs; and we were un-

(Deposition of William Victor Knourek.)

able to do so with a six pound hammer, swinging this hammer with both hands."

Mr. Olson: "But you do know if the hole was large enough it would be very easy to break off the prongs?"

Mr. Callaway: "If the blow-hole was large enough you [283] would be able to see it; and in this case, where the blow-hole was supposed to be, if the blow-hole was large enough that part of the prong would be separated from the casting."

Mr. Olson: "Now, by the prong, you are now speaking of that part of the panel raiser head upon which the cutting blades are mounted?"

Mr. Callaway: "That's right."

Mr. Olson: Page 48, at the bottom. "Your company recognizes that unless the machine tools put out by it are structurally sound, that the use of those tools may constitute a danger to the operator; is that correct?"

Mr. Callaway: "That is correct."

Mr. Olson: "And that, among other reasons, is the purpose of the examination and inspections you make of your various machine tools, including the Champion panel raiser head; is that correct?"

Mr. Callaway: "That is right, sir."

Mr. Olson: "Now, I believe you said that you had been 21 years, or thereabouts, since 1928, I think you said, with the Woodworkers Tool Works, in various capacities?"

Mr. Callaway: "That is right."

(Deposition of William Victor Knourek.)

Mr. Olson: "And have you worked in every division or department of the shop?"

Mr. Callaway: "That is correct."

Mr. Olson: "And many of those in the office, I assume; [284] is that right?"

Mr. Callaway: "Very little office work."

Mr. Olson: "Practically all production work?"

Mr. Callaway: "That is right."

Mr. Olson: "At any rate, you are thoroughly familiar with the various phases of the manufacture of machine tools made by your company, including the Champion panel raiser head?"

Mr. Callaway: "That is right."

Mr. Olson: "And you are also thoroughly familiar with the various steps and methods used in testing and inspecting and examining those tools, from one phase or one step; that is, from the beginning of the manufacturing process down until the finished product is taken out, turned out; is that correct?"

Mr. Callaway: "That is right."

Mr. Olson: Then there is a lot of squabbling.
Page 55, Mr. Callaway.

"Now, a small blow-hole might not have any effect on the casting at all, is that right?"

Mr. Callaway: "That is right."

Mr. Olson: "But a large blow-hole might have a serious effect, and might cause a grave structural defect?"

Mr. Callaway: "Yes."

(Deposition of William Victor Knourek.)

Mr. Olson: "And it would depend on the size of the blow-hole, as to whether it constituted a structural defect, or [285] not?"

Mr. Callaway: "But a blow-hole that large would be detected in the machining of the casting."

Mr. Olson: Page 59, Mr. Callaway.

"One is blow-holes at the point of break; the second is high phosphorus; and the third is high silicon content; could those cause a structural weakness?"

Mr. Callaway: "I answered, I don't know."

Mr. Olson: "In the casting?"

Mr. Callaway: "I don't know."

Mr. Olson: "Yet, you have 21 years in the machine tool business?"

Mr. Callaway: "That is right."

Mr. Olson: "And you have conducted examinations and inspections of castings, including Champion panel raiser heads such as the one in question here?"

Mr. Callaway: "That is right."

Mr. Olson: "And yet you say you don't know that would cause a dangerous condition?"

Mr. Callaway: "I don't know."

Mr. Lopardo: Now, redirect examination, on page 60.

Redirect Examination

"The castings which were used in the panel raiser head in question, that was purchased from a reputable manufacturer, was it not?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "They were." [286]

Mr. Olson: I object to that question and make a motion to strike on the ground that it is irrelevant and immaterial.

The Court: That is along the same line. The objection is sustained.

Mr. Lopardo: "Furthermore, had you ever had any trouble with any castings which you had purchased from this company?"

Mr. Callaway: "Never."

Mr. Olson: I object on the same grounds.

The Court: The objection is sustained.

Mr. Lopardo: Page 62.

"In the manufacture of your product here, you mentioned certain inspections; these inspections are carried out during the entire manufacture, is that correct?"

Mr. Callaway: "That is right."

Mr. Lopardo: "And these inspections are made to determine that the casting which is used is in good condition, and will withstand the pressure to which it will be subjected?"

Mr. Callaway: "It will more than stand the pressure; that is a very light cut."

Mr. Lopardo: "And in determining whether or not these castings would stand the pressure which would be required of them, in the use for which they are manufactured, have you made certain tests; namely, drilling holes through the arms to determine whether or not that would weaken the

(Deposition of William Victor Knourek.)

arms [288] to an extent that it would break if used for the purpose for which manufactured?"

Mr. Olson: I object to that as leading and suggestive. Secondly, the test suggested and assumed is irrelevant, and the results thereof would be immaterial and irrelevant to any issue in this case. Thirdly, there is no comparison of any conditions under which such tests would be made and the conditions under which the particular accident in question here is alleged to have occurred.

The Court: I will sustain the objection.

Mr. Lopardo: Starting on page 64 at the top:

"When it comes in, that is inspected by the clerk; is that correct?"

Mr. Callaway: "That is right."

Mr. Lopardo: "From there where does the casting go?"

Mr. Callaway: "It goes to the shop, and the foreman——"

Mr. Lopardo: "And who is the foreman?"

Mr. Callaway: "Mr. Charles Meissner."

Mr. Lopardo: "How long has Mr. Meissner been with your company?"

Mr. Callaway: "Five years."

Mr. Lopardo: "What is his background, is he a skilled workman or——"

Mr. Callaway: "Mr. Meissner is regarded as a toolmaker; and before working for us he worked for the Chrysler Corporation, [288] I believe; and prior to that I believe it was 15 years for some other concern."

(Deposition of William Victor Knourek.)

Mr. Lopardo: "Have you given instructions to Mr. Meissner and to your other employees regarding what they are to do during the process of completing this casting, into a head?"

Mr. Callaway: "We have made this tool——"

Mr. Olson: That can be answered yes or no.

Mr. Lopardo: "Whether you have given them instructions?"

Mr. Callaway: "Yes."

Mr. Lopardo: "Have you given him any instructions regarding—what are those instructions?"

Mr. Callaway: "We have been making this head for over 20 years; and we have a sample of most everything we manufacture. When these heads are made we just take our sample head we have, and we give it to Mr. Meissner, who is a toolmaker and knows just what to do; and he does not have to be told what to do."

Mr. Lopardo: "Yes?"

Mr. Callaway: "Upon seeing the head he knows what to do."

Mr. Lopardo: "What I mean is, do you have standing instructions to all your working force what they are to look for in the process?"

Mr. Callaway: "That is right."

Mr. Lopardo: "What are they to look for?" [289]

Mr. Callaway: "Well, they are to look for flaws in the casting, upon machining the casting; if they hit any blow-holes they are supposed to scrap the

(Deposition of William Victor Knourek.)

casting immediately. And then the most important thing is size; or one of the important things is size, such as the hole diameter, and other different measurements of the tool."

Mr. Lopardo: "I believe you stated on cross-examination that there are around seven inspections that are made in the process."

Mr. Callaway: "At least seven; even more."

Mr. Lopardo: "And those are made by competent and skilled workmen, are they not?"

Mr. Callaway: "Mostly skilled workmen; the receiving clerk that makes the first inspection, we would not call him a skilled workman; but from then on—and then the shipping clerk that makes the final inspection; but all in between are skilled workmen."

Mr. Lopardo: "Then you have five inspections here that are made by skilled workmen?"

Mr. Callaway: "That is right."

Mr. Lopardo: "You were asked in that long question whether or not an accident would occur to one of these panel raiser heads; if the panel raiser head were improperly installed, might that cause it to break?"

Mr. Callaway: "It might." [290]

Mr. Lopardo: "I believe you were asked here if that were installed upon a double spindle shaper manufactured by C. O. Porter Company; now, if they were improperly installed, would that cause it to break?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "Yes."

Mr. Lopardo: "In other words, the panel raiser head would have to be installed at the proper—there would have to be proper clearance, would there?"

Mr. Callaway: "There would; there would have to be proper clearance."

Mr. Olson: Let him tell what would have to be done.

Mr. Callaway: "The two castings would have to be staggered, so they could not hit; and the set screws would have to be tightened securely."

Mr. Lopardo: "If part 1 and part 2 of Defendant's Exhibit 1 were properly installed, what would be the position of the arms of each part?"

Mr. Olson: "With relation to each other?"

Mr. Lopardo: "Yes."

Mr. Callaway: "They would be staggered; they would not be aligned."

Mr. Olson: "He did cover that; he said one arm would be midway between the two on the other part."

Mr. Lopardo: "If they were exactly opposite each other, what would that indicate to you?" [291]

Mr. Callaway: "It would indicate that the tool has been misused; and the way we manufacture that head, it is impossible to line them up opposite one another."

Mr. Lopardo: "If they were lined up opposite other, what would that indicate?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "That the tool was misused, or an accident was had, of some kind."

Mr. Lopardo: "Is it possible to line them up exactly opposite each other, without breaking?"

Mr. Callaway: "The only way you can line those up is by breaking the tool, or shearing the pin and moving the set screws from the flats of the sleeve; and this being done, it would have to be a terrific shock to the tool in order to be powerful enough to do that; it could not be done by cutting a panel on a door, which is a very light cut, as far as wood-working is concerned."

Mr. Lopardo: "Assuming for the purposes of this question that you had a small air pocket in one of these arms which was incapable of being discerned by visible inspection, would that break in normal use?"

Mr. Olson: I will object to the question, unless the size of the air pocket is more definitely defined.

The Court: The objection is sustained.

Mr. Lopardo: "Well, an air pocket of the size which counsel suggested in his hypothetical question." [292]

Mr. Olson: "I did not suggest a size."

The Court: All right. That will have to be taken in conjunction with the other. You may answer.

Mr. Callaway: "That is right."

Mr. Olson: "I think we could agree if it were tiny it would have no effect, unless there were a lot of them; is that right?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "That is right."

Mr. Lopardo: "If you had an air pocket which extended directly through the arm, from one side to the other, if it were directly in the center, would that still be able to withstand normal use?"

Mr. Callaway: "Due to the light cut it is making on a panel, I am sure that if there were such a blow-hole it would not have any effect on the tool whatsoever."

Mr. Lopardo: "That is substantiated by the tests which you have made, in these tests?"

Mr. Callaway: "That is right."

Mr. Lopardo: "In other words, the size of the castings which you used——"

Mr. Callaway: "Now, if you will notice, that blow-hole could not have been very large in here; but you will notice, they are $\frac{3}{8}$ inch cap screws; those are large holes. Back here (indicating) you have got a half-inch hole for a milled head set screw; these holes are larger than any possible hole [293] could be in this blow-hole."

Mr. Lopardo: "You mean in the arm?"

Mr. Callaway: "In the arm. If the tool did break, why didn't it break at the $\frac{3}{8}$ inch hole, or the $\frac{1}{2}$ inch hole, which is bound to weaken the casting?"

Mr. Olson: "I move that the entire answer be stricken; first, not responsive; and secondly, it constitutes mere argument or speculation of the witness. Can we agree that the answer may go out?"

(Deposition of William Victor Knourek.)

The Court: Motion denied.

Mr. Lopardo: "Why do you use steel castings, instead of some other metal?"

Mr. Callaway: "Well, we use cast steel castings because we know they are about the strongest castings you can use; and all manufacturers of heads use steel castings. For a number of years we manufactured this head out of bronze castings; and even with the bronze castings we had no breakage. And we know the steel casting is so much superior to the bronze casting, as far as strength is concerned."

Mr. Olson: "I move that the entire answer be stricken, as not responsive; secondly, irrelevant; thirdly, constituting a self-serving statement and an argument by the witness."

The Court: The motion will be denied.

Mr. Lopardo: "In other words, a casting which has been [294] machined in your shop and subjected to all of your tests would not break under ordinary use; is that what I understand you to say?"

Mr. Olson: "I object to that question, as calling for the speculation and conclusion of the witness, and irrelevant."

The Court: The objection is sustained.

Mr. Callaway: The middle of page 71.

Mr. Lopardo: "Please—what I am after—strike that question; I will ask you in a different way: In order for a casting, or one of your heads to break, it would be required that there would be a misuse of some kind; is that correct?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "That is right."

Mr. Lopardo: "In other words, for one of those arms to break off it would be required that they had a wrench, or something else was thrown in there, and it came against it?"

Mr. Callaway: "It hit some hard object, not necessarily a wrench; but in order to break off it would have to be a terrible blow. There could be a tool left on the mill or work table of the machine, after the head it put on."

Mr. Lopardo: "Or that it was not properly installed?"

Mr. Callaway: "Was not properly installed."

Mr. Olson: At this time I object to that whole line of questioning and answers on the ground the questions are leading [295] and suggestive, self-serving, and call for the witness to give pure conclusions and opinion.

The Court: It is redirect examination.

Mr. Olson: He doesn't have the part, he hasn't seen the part.

The Court: Your correspondent brought up this entire matter. Otherwise, the testimony of this witness could have been concluded in 10 pages. So, having brought up that matter and it having gone in, we will have to allow cross-examination.

Mr. Olson: Proper cross-examination. I say it calls for conclusion and speculation on the part of the witness.

The Court: He is just as much an expert as an

(Deposition of William Victor Knourek.)

expert you produce and would ask a hypothetical question about the result of blow-holes.

Mr. Olson: This man is not an expert. He is the president of a steel company.

The Court: You can argue the effect of his testimony to the jury. The objection is overruled.

Mr. Lopardo: "You had no reason to suspect that there might be any defect in any of the merchandise which you purchased from the Gunite people?"

Mr. Callaway: "No, sir."

Mr. Olson: I object and move that be stricken.

The Court: The objection is overruled. [296]

Mr. Lopardo: "You never had any one of these panel raiser heads break, in any prior instance?"

Mr. Olson: I object to that as being irrelevant and immaterial.

The Court: The objection will be sustained as to that.

Mr. Lopardo: That is all.

Mr. Olson: Now we are back on recross-examination.

The Court: All right.

Recross-Examination

Mr. Olson: "Well, now, Mr. Knourek, you have not personally, you have no personal knowledge of whether any one of the several inspections that you say are usually made on this type of Champion panel raiser head actually were made; that is, you were not present, you did not conduct it; is that

(Deposition of William Victor Knourek.)

correct? Just answer me, do you have personal knowledge of whether inspections of this particular Champion panel raiser head were made?"

Mr. Callaway: "I have."

Mr. Olson: "You say you do? Do you remember the particular head?"

Mr. Callaway: "Do I have to answer that yes or no, or can I answer yes or no and then tell my reasons?"

Mr. Olson: "Answer yes or no, and then if you want to make an explanation—you don't have any personal recollections of that, do you, the inspection of this particular head? You have already testified you didn't know anything [297] about this particular head."

Mr. Callaway: "No, I do not have any recollection of that, but we had two or three telegrams on that head."

Mr. Olson: "That is all I want; you don't have any personal knowledge of those inspections of that head, you were not there, and you did not participate; isn't that right?"

Mr. Callaway: "I cannot answer that question."

Mr. Olson: "You don't remember, is that right?"

Mr. Callaway: "If there were telegrams coming in, I must have checked on that head."

Mr. Olson: "I am asking you if you remember in your own mind at this moment; you don't have any recollection, do you?"

Mr. Callaway: "I do not."

(Deposition of William Victor Knourek.)

Mr. Olson: "Cutting on a door; that is, raising a panel on a door, which is the type of operation that was performed when this particular head exploded and disintegrated, you say that is a light cut?"

Mr. Callaway: "Yes, sir."

Mr. Lopardo: I object to that on the ground it presumes something not in evidence, something that wasn't testified to by the witness.

Mr. Callaway: Let's waive the objection and go ahead.

The Court: Go ahead. You may answer. [298]

Mr. Callaway: "Yes, sir."

Mr. Olson: I think you read there, Mr. Callaway.

Mr. Callaway: "I would say it was a light cut; yes, sir."

Mr. Olson: "Now, you say even if there were an air pocket entirely through the arm, that that might not cause damage, or cause the arm to break; is that right?"

Mr. Callaway: "That is right, sir."

Mr. Olson: "But then if the air pocket were large enough it certainly might cause the head to break?"

Mr. Callaway: "Yes, it would."

Mr. Olson: "And any air pocket constitutes a light or a large defect, depending on the size structural defect in the arm, doesn't it—if there is an air pocket in the arm?"

Mr. Lopardo: I object to that on the ground this man hasn't been qualified as a metallurgist and—

(Deposition of William Victor Knourek.)

The Court: I think in view of the latitude I allowed you on the cross, I will allow that.

Mr. Callaway: "Yes; but how strong does that steel have to be?"

Mr. Olson: Where is that?

Mr. Callaway: Page 75, line 5.

Mr. Olson: I have the question before that.

Mr. Lopardo: He answered. [299]

Mr. Olson: "No, that is not the question; the steel, is not as strong with the air pocket as it is without; isn't that true?"

Mr. Callaway: "It all depends on the size of the air pocket."

Mr. Olson: "But if the air pockets are large, or even if they are small but they are numerous, that could weaken the arm?"

Mr. Callaway: "That is right, sir."

Mr. Olson: "And if they did weaken the arm, it could constitute a structural defect?"

Mr. Callaway: "No, sir."

Mr. Olson: "It would not be dangerous?"

Mr. Callaway: "It all depends on the size."

Mr. Olson: "Assume it would be large enough?"

Mr. Callaway: "If it would be that large we would be able to see it, and we would not have manufactured it."

Mr. Olson: "That is not a point; but if it were large it could be dangerous?"

Mr. Callaway: "Certainly."

Mr. Olson: The bottom of page 76.

(Deposition of William Victor Knourek.)

“If it were small enough it would have no effect; and if small and they were frequent enough it cause a dangerous condition?”

Mr. Callaway: “That is right.” [300]

Mr. Olson: “And you recognize, in manufacturing these heads, that such dangerous conditions could exist; and that is the reason you make your inspections; is that right?”

Mr. Lopardo: I object to——

Mr. Callaway: Waive the objection, and let's go ahead.

Mr. Olson: Go ahead and answer it.

The Court: Go ahead and answer it.

Mr. Callaway: “Yes, we do.”

Mr. Olson: “You make the inspections to prevent dangerous conditions, among other reasons?”

Mr. Callaway: “Yes, we do.”

Mr. Olson: “And it is for the purpose of finding out dangerous conditions, among other things, that you make those inspections; is that right?”

Mr. Callaway: There is some more to the question.

Mr. Olson: “He can answer yes or no.”

Mr. Callaway: “One of the many reasons.”

Mr. Olson: “You have to discover if there are any dangerous conditions, is that right?”

Mr. Callaway: “I answered that.”

Mr. Olson: “You answered it yes?”

Mr. Callaway: “Yes.”

Mr. Olson: “All right; now, what is the par-

(Deposition of William Victor Knourek.)

particular type of steel casting used; is there any particular name, trade name—or other description other than just steel casting?" [301]

Mr. Callaway: "I don't know what it is, but is a very strong machinery steel; I think it is an SAE 1025; that is what they call it. And we have used steel with SAE 1045."

Mr. Olson: "But you don't know what kind of steel it is, definitely and precisely; is that right?"

Mr. Callaway: "Not unless I looked at my records, sir."

Mr. Olson: "You do not test the castings; that is, your company; you only inspect them?"

Mr. Lopardo: I object to that on the ground it has already been asked and answered; covered before.

Mr. Olson: Distinction between testing and inspecting.

The Court: I will overrule that objection.

Mr. Callaway: Let me see if I can find the answer. "That is right."

Mr. Olson: "Now you stated that this particular head ordinarily is used at a speed of 7500 rpm?"

Mr. Callaway: "No, I said 7200, from 3000 to 7200."

Mr. Olson: "And it could be run safely at higher speed?"

Mr. Callaway: "I don't know; but there is a possibility it could. I would not hesitate to run that machine at higher speed."

Mr. Olson: "Even up to 10,000?"

(Deposition of William Victor Knourek.)

Mr. Callaway: "That is right."

Mr. Olson: That is all. That takes care of that part.

The Court: All right. We will take a recess. [302]

May it be stipulated the usual admonition has been given to the jury?

Mr. Olson: So stipulated.

Mr. Callaway: So stipulated.

(A short recess was taken.)

The Court: Let the record show the jury is in the box.

Mr. Lopardo:

"CHARLES E. MEISSNER

a witness of lawful age, produced on behalf of the defendant, and being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and under oath deposed and testified as follows:

"Direct Examination

"Will you give us your full name?"

Mr. Callaway: "Charles E. Meissner."

Mr. Lopardo: "Where do you live?"

Mr. Callaway: "At 10037 South Wallace Street, Chicago."

Mr. Lopardo: "You are employed where?"

Mr. Callaway: "Woodworkers Tool Products, 222 South Jefferson, Chicago, Illinois."

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "How long have you been employed there?"

Mr. Callaway: "Five years."

Mr. Lopardo: "And prior to coming to the Woodworkers Tool Products, where were you employed?"

Mr. Callaway: "Chrysler Corporation."

Mr. Lopardo: "What kind of work did you do there?" [303]

Mr. Callaway: "The same kind of work; I was tool room lead man there."

Mr. Lopardo: "A lead man is what, the same as a foreman?"

Mr. Callaway: "Tool room lead man, that is correct."

Mr. Lopardo: "Prior to that, where were you employed?"

Mr. Callaway: "I worked for F. H. Noble & Company."

Mr. Lopardo: "What did you do there?"

Mr. Callaway: "I was a tool and die maker."

Mr. Lopardo: "You have been in that line of work now altogether about how many years?"

Mr. Olson: "He has testified to three different types of work."

Mr. Callaway: "The same type of work; I was originally a toolmaker; that is my trade."

Mr. Lopardo: "And you have been in your trade about how many years?"

Mr. Callaway: "About 22 years."

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "Now, at the Woodworkers Tool Works, will you tell us exactly what your duties are?"

Mr. Callaway: "I am plant superintendent there."

Mr. Lopardo: "The Woodworkers Tool Works, one of the products they manufacture is a panel raiser head; is that correct?"

Mr. Callaway: "That is one of their many items, yes."

Mr. Lopardo: "I will show you what has been identified [304] as Defendant's Exhibit 1, and ask you if that is the panel raiser head which is manufactured by the Woodworkers Tool Works?"

Mr. Callaway: "Yes."

Mr. Lopardo: "Now, will you tell us the procedure followed in the manufacturing of a panel raiser head?"

Mr. Callaway: "Do you want all those operations?"

Mr. Lopardo: "Yes."

Mr. Olson: "From the beginning."

Mr. Callaway: "From the beginning, all right: First of all, I would make out the order for these castings."

Mr. Lopardo: "You purchased the castings from whom?"

Mr. Callaway: "I purchased these castings from Gunitite Foundry, Rockford, Illinois."

Mr. Lopardo: "And now, were you aware of the

(Deposition of Charles E. Meissner.)

reputation of the Gunitite Foundries in the trade?"

Mr. Callaway: "Yes, I was."

Mr. Olson: "I object to that, as being irrelevant and immaterial."

The Court: The objection is sustained.

Mr. Lopardo: "What type of castings were purchased?"

Mr. Callaway: "These were steel castings."

Mr. Lopardo: "Now, I assume that they arrived at the plant, at the Woodworkers Tool Works."

Mr. Callaway: "Yes, about in October of 1948." [305]

Mr. Lopardo: "Upon their arrival, what is done with them?"

Mr. Callaway: "I have a clerk in the tool room there who checks all these orders as they come in. He checks them for weight, and he does inspect them."

Mr. Lopardo: "Does he examine each individual casting?"

Mr. Callaway: "He does, as he weighs it, looks it over thoroughly."

Mr. Lopardo: "Now, have you given him any instructions as to what he is to look for?"

Mr. Callaway: "Yes, I have."

Mr. Lopardo: "What are those instructions?"

Mr. Callaway: "He does look for any noticeable defects that he could see."

Mr. Lopardo: "Among them, would that be cracks?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Cracks, bubbles, air bubbles, you might say air pockets."

Mr. Lopardo: "From the first arrival, where do they go from there?"

Mr. Callaway: "He gives them to me, and I put them in a storage bin."

Mr. Lopardo: "And do you do anything with them, prior to putting them in the bin?"

Mr. Callaway: "No; I just put them in the bin."

Mr. Lopardo: "And then what do you do with them?" [306]

Mr. Callaway: "Then some time later an order might come up from the office, a customer specifying a panel raiser head."

Mr. Lopardo: "They are kept there until you have an order?"

Mr. Callaway: "They are kept there until I have an order, I get these two castings for that; I look them over, and give them to an engine lathe operator."

Mr. Lopardo: "Then each of these is milled when you have an order?"

Mr. Callaway: "Yes, when I have an order; or sometimes I might even make a run of them."

Mr. Lopardo: "In the particular case, the order that you received from the Woodworkers Supply, were those made up specially or were they in stock; or do you remember that?"

Mr. Olson: "Can we stipulate that you are talking about the order, the panel raiser head that is in issue here?"

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "That is right."

Mr. Olson: "Very well."

Mr. Callaway: "That particular one was made up especially for them; I remember that distinctly."

Mr. Lopardo: "Now, will you tell us what you did in making up that particular head?"

Mr. Olson: "If you remember." [307]

Mr. Callaway: "I do remember. I wonder if I could say something off the record here: When I made this particular head I made others right along with that."

Mr. Lopardo: "That is all right; just tell how you made them."

Mr. Callaway: "In making this head I got the order, I inspected it, I gave it to the engine lathe operator."

Mr. Lopardo: "That is, you took the two castings, is that right?"

Mr. Callaway: "Two castings, yes."

Mr. Lopardo: "All right; and you gave them to the lathe operator?"

Mr. Callaway: "I gave it to the engine lathe operator. He, in turn, inspected it, looked it over thoroughly, and he chucks it up in a lathe and starts facing it."

Mr. Olson: "I object and move that the answer be stricken, unless the witness states that he saw this done, of his own personal knowledge."

Mr. Callaway: "I did see that done."

The Court: All right. He corrected himself. Go ahead.

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "All right; now proceed."

Mr. Callaway: You skipped a question.

Mr. Olson: I asked, "Did you see him inspect it?"

Mr. Callaway: "Yes. My desk is right alongside of his engine lathe." [308]

Mr. Lopardo: "All right; now proceed."

Mr. Callaway: "He faced it off; he inspected it, chucked it and faced it off, and started boring on this particular head."

Mr. Lopardo: "Now will you tell us, the first operation is facing it; is that correct?"

Mr. Callaway: "The first operation on this head, he would chuck this on an engine lathe."

Mr. Olson: "That means fastening it?"

Mr. Callaway: "Yes. He tightens it in the lathe. He faces this and bores this at the same time. He also does this one here, (indicating) faces it."

Mr. Olson: "Faces it means machines it off?"

Mr. Callaway: "Yes; he just takes a cut right across this face here. (Indicating.)"

Mr. Lopardo: "In other words, that removes all the excess rough metal that might be there?"

Mr. Callaway: "That is right."

Mr. Lopardo: "So the roughness is removed?"

Mr. Callaway: "The roughness is removed; and in doing so he would notice any imperfections that might be in that casting."

Mr. Olson: "I object to that, and move it be stricken, as a conclusion of the witness."

(Deposition of Charles E. Meissner.)

The Court: Read the question. [309]

Mr. Lopardo: "So the roughness is removed?"

Mr. Callaway: "The roughness is removed; and in doing so he would notice any imperfections that might be in that casting."

Mr. Olson: That calls for a conclusion.

The Court: It is the ordinary conclusion that anyone would make.

Mr. Olson: He is concluding what someone else would do.

The Court: If it is what would appear to anybody, he may make that statement, even though he did not do it himself. The motion will be denied.

Mr. Lopardo: "He has instructions from you to look for any imperfections?"

Mr. Callaway: "He has, yes."

Mr. Lopardo: "Now proceed; what would he do?"

Mr. Callaway: "Faces it and bores it in each, two details."

Mr. Lopardo: "You give him instructions as to what bore?"

Mr. Callaway: "The bore is on the customer's order."

Mr. Lopardo: "All right."

Mr. Callaway: "And then he probably ran several others with this."

Mr. Lopardo: "About how long would that facing operation take?"

Mr. Callaway: "The facing operation on that, I

(Deposition of Charles E. Meissner.)

would say just the facing alone would take—it is an interrupted [310] cut—five minutes.”

Mr. Lopardo: “That would be facing on one side?”

Mr. Callaway: “That is just this one side only.”

Mr. Lopardo: “Before he moves it, would he make the bore?”

Mr. Callaway: “Yes, he would face this and bore it at the same time, while it is in the machine; so it would be at right angles.”

Mr. Lopardo: “Would the facing take place at the same time as the boring?”

Mr. Callaway: “No; that is two operations, although it would be in the machine at the same time, in this chuck.”

Mr. Lopardo: “As the facing takes place the casting is revolved, is it not?”

Mr. Callaway: “That is right.”

Mr. Lopardo: “That is at a slow rate, is it not?”

Mr. Callaway: “That is an interrupted cut; I would say a slow rate, yes.”

Mr. Lopardo: “So at the time it revolves around, the operator of the lathe can see the surface?”

Mr. Callaway: “He can.”

Mr. Lopardo: “And your instructions are that they are to observe the surface in the complete operation; is that correct?”

Mr. Callaway: “They are; that is right.” [311]

Mr. Lopardo: “Once the facing is completed on the one side, then the lathe operator does the following operation; is that correct?”

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Yes."

Mr. Lopardo: "And that would take about how long?"

Mr. Callaway: "The boring of that, that all depends on the inside diameter; that, I would say, would be ten minutes."

Mr. Lopardo: "Then after the boring is completed, what is the next operation?"

Mr. Callaway: "You must remember, he has two heads here; and he also would take this detail here (indicating) and do the same operation."

Mr. Lopardo: "This has been marked here part 1 and part 2 of Defendant's Exhibit 1;—

Mr. Callaway: "Yes."

Mr. Lopardo: "Can you indicate on Defendant's Exhibit 1 how that would be completed, or handled?"

Mr. Olson: "You mean during this operation, the boring?"

Mr. Lopardo: "Yes."

Mr. Callaway: "Of course, you want to realize that he could take either one of them and do any one first; it wouldn't make any difference."

Mr. Lopardo: "In the beginning of the operation you have two castings that will look practically the same; is [312] that it?"

Mr. Callaway: "That is right, with the exception of this. (Indicating.)"

Mr. Lopardo: "After he has completed the boring, then he would remove that, is that correct?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "That is right."

Mr. Lopardo: "And at that time is there any inspection made?"

Mr. Callaway: "Well, he would see any noticeable defects as he is machining it, because he is machining off this rough surface."

Mr. Lopardo: "What will he do after he removes the casting from the machine, after he has completed the boring?"

Mr. Callaway: "He could chuck it over and put in the other detail, either part 1 or part 2."

Mr. Olson: "I would like to enter a general objection to this entire line of testimony as to what a workman would do: First of all, being a mere conclusion of this witness, not in the form of direct testimony, and being self-serving, and as being mere testimony of a custom rather than direct testimony of matters to which this witness can testify of his own knowledge and memory."

Mr. Lopardo: Your Honor, I would like to refer back to page 84 where Mr. Johnston, who was representing the plaintiff, said, "Can we stipulate that you are talking about the order, [313] the panel raiser head that is in issue here?"

Mr. Olson: What he would do, not what he did do. Each question is what would he do then. It is custom, not what he did do.

The Court: I think the method of expression may be unfortunate. What the man is trying to do is narrate the sequence of things that the man did, ac-

(Deposition of Charles E. Meissner.)

According to instructions. He is merely describing it as though a man takes what we call the narrative present and says, "He says," and "I says," and "He says," and "I says," and so forth. He is telling something he saw, but he is using that method of expressing himself.

Mr. Olson: I see.

The Court: It is quite apparent the man is talking about various processes which were done under his direction and observation, according to his instructions.

You finally have before the court the foreman testifying to the things the other man would not testify to. The motion is denied.

Mr. Lopardo: "Now I will ask you whether or not those operations were performed on the Champion panel head which was made for the Woodworkers Supply Company?"

Mr. Olson: "If he knows; if he doesn't, he can so state."

Mr. Callaway: "Yes, that was." [314]

Mr. Lopardo: "Now, what was the next operation?"

Mr. Callaway: "Assuming that the engine lathe operator has both these details finished, he would give it back to me."

Mr. Lopardo: "Now he would take the casting, and would he perform an operation on the other side; or are they performed both sides simultaneously?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "No, one side at a time."

Mr. Lopardo: "I am indicating here, for the purpose of the record, part 2 of Defendant's Exhibit 1; in other words, the casting would have to be removed?"

Mr. Callaway: "Removed, and the other one put in."

Mr. Lopardo: "Then turned over, with the other face exposed; he would machine one side, and bore it?"

Mr. Callaway: "That is right. Then he would take this one face, (indicating) this one, and bore this inside dimension in here."

Mr. Lopardo: "Would he then proceed, or did he then proceed to face the other side?"

Mr. Olson: "I object to the question, as being leading and suggestive." That is withdrawn.

Mr. Lopardo: That is withdrawn.

Mr. Olson: Excuse me. Strike that.

Mr. Lopardo: "What did he do next?"

Mr. Callaway: "He took it out of the machine and checked [315] it over; and then he would put it on an arbor; he would face off this other side, and turn this outside diameter."

Mr. Lopardo: "Indicating part 2 of Defendant's Exhibit 1. All right; now, what was the next operation?"

Mr. Callaway: "Assuming that he is finished, there are several other little things."

Mr. Lopardo: "Then he would chuck the other casting; is that correct?"

(Deposition of Charles E. Meissner.)

Mr. Olson: If you want to skip now to where he rephrased it——

Mr. Lopardo: Where is that, now?

Mr. Olson: My man says, if you will ask it in another form, and he does ask it in another form.

Mr. Lopardo: "Now we have completed the one casting; now what would be the next operation?"

Mr. Callaway: "Assuming we have completed this part 1——"

Mr. Lopardo: "All right."

Mr. Callaway: "He would take that out of the machine, chuck up part No. 2——"

Mr. Olson: For the purpose of the record I will make the same objection, what he would do.

The Court: The man is using that method of saying what is being done.

Mr. Olson: I just want the record to persist in that [316] objection.

The Court: He chooses that mode to tell the story.

Mr. Lopardo: "Now, proceed; what was done?"

Mr. Callaway: "He would take part 1 out of the machine and put in, chuck up part No. 2. He would face that, bore it, and turn the outside dimension."

Mr. Lopardo: "Then what else?"

Mr. Callaway: "I should not have said turn the outside dimension in that one operation; that would be an impossibility."

Mr. Lopardo: "How would that be handled?"

Mr. Callaway: "That would be put on an arbor and it would be turned then."

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "Have you give us the complete operation of the lathe operator, the complete operation that the lathe operator performs?"

Mr. Callaway: "Yes; he would face this angle and turn the outside dimension also on it."

Mr. Lopardo: "All right."

Mr. Callaway: "That would complete the engine lathe operator's part of the work."

Mr. Lopardo: "Then what happened, or what was done with the two units?"

Mr. Callaway: "He gives me this casting, as with this here; I look it over, and give it to a milling machine [317] operator we have there."

Mr. Lopardo: "Why do you look it over?"

Mr. Callaway: "I check it for any noticeable defects, or air bubbles that might be in there."

Mr. Olson: I am going to make the objection. It has been ruled on.

Mr. Lopardo: "The testimony which you have given here is what was done to the Champion panel head which was sold to the Woodworkers Supply Company; is that correct?"

Mr. Olson: "I object to that, as being leading and suggestive; and move both the question and answer be stricken."

The Court: Overruled.

Mr. Callaway: "Yes."

Mr. Lopardo: "You know that of your own knowledge?"

Mr. Callaway: "I do."

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "You were present when that was performed?"

Mr. Callaway: "I was."

Mr. Olson: Objected to as leading and suggestive.

The Court: Overruled.

Mr. Lopardo: "Will you tell us what you did next?"

Mr. Callaway: "I looked this head over, and I gave it to the milling machine operator, who in turn——"

Mr. Olson: "What was his name?"

Mr. Callaway: "Victor Barron." [318]

Mr. Lopardo: "What did he do?"

Mr. Callaway: "He milled that slot in there, milled two flats for the set screws, put the pin in; also got a fixture out and drilled the holes necessary for the mounting of these knives on."

Mr. Lopardo: "Anything further?"

Mr. Callaway: "Of course, he checked it at the same time, before it was returned to me."

Mr. Lopardo: "That was then delivered to you, is that correct?"

Mr. Callaway: "Yes."

Mr. Lopardo: "And what did you do with it then?"

Mr. Olson: I object to that as leading and suggestive, the form of the question.

The Court: Overruled.

Mr. Lopardo: "Well, did you do anything then with it?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Yes, I check that head over, and it is also then balanced."

Mr. Lopardo: "Who did that?"

Mr. Callaway: "I do the balancing myself."

Mr. Lopardo: "And then what was done, if anything?"

Mr. Callaway: "The knives are inserted."

Mr. Olson: Go ahead.

Mr. Lopardo: "Go right ahead."

Mr. Callaway: "It is checked if there is variation. [319] I in turn check it with the order, and give it to the engine lathe operator, who mounts these knives on."

Mr. Lopardo: "All right."

Mr. Callaway: "He has a fixture or a bar there that he clamps in his lathe, and he sets the knives at that proper angle."

Mr. Lopardo: "Does he have any directions as to any inspection of any kind?"

Mr. Callaway: "Yes."

Mr. Olson: Same objection, leading and suggestive.

The Court: Overruled.

Mr. Callaway: "Yes, he has orders from me, if there is anything wrong with it to complain to me about it."

Mr. Olson: "Who is this man?"

Mr. Callaway: "That is my assistant up there, Henry Danielson."

Mr. Lopardo: "Mr. Danielson, then, he cuts the

(Deposition of Charles E. Meissner.)

holes for the cutting edges or blades; is that correct, on that operation?"

Mr. Callaway: "No, that is another operation; that has not been discussed at all."

Mr. Lopardo: "Have you told us everything he does on that operation?"

Mr. Callaway: "Those knives we make up, probably a hundred at a time." [320]

Mr. Lopardo: "Have you told us now everything that he does on that operation?"

Mr. Callaway: "I got up to his locating these knives on the machine."

Mr. Lopardo: "What does he do next?"

Mr. Callaway: "He locates these knives, checking it over; and then the head is finished. It comes back to me once more; I look it over, I check it for bore, and I know that it is properly balanced; I balance it myself. And I put this head on the finished bench."

Mr. Lopardo: "And prior to putting it on the finished bench, is there anything else that you do with it?"

Mr. Callaway: "I did leave out one operation there."

Mr. Lopardo: Will you tell us that operation?"

Mr. Callaway: "I neglected to say that these go down to the cutter, grinders; and they face off the part where the knife is clamped onto one of these arms. They, in turn, inspect it and look it over."

Mr. Lopardo: "Now, at each stage, then, it is checked——"

(Deposition of Charles E. Meissner.)

Mr. Olson: "Just a moment; the question is leading and suggestive."

The Court: Pardon?

Mr. Olson: I say the question is leading.

The Court: Read the question.

Mr. Lopardo: "At each stage, then, each of these checked——" [321]

Mr. Olson: "Just a moment; the question is leading and suggestive."

The Court: Overruled.

Mr. Lopardo: "At each stage, then, each of these is checked and examined for any defects of any kind?"

Mr. Callaway: "They are, after each operation."

Mr. Lopardo: "Now, have you told us everything that is done at each operation?"

Mr. Callaway: "Except it is balanced; and in balancing you do grind off the rough parts of metal on the back. It is also checked and inspected then, and you also have a good chance of looking it over; you are handling each one, and you are grinding on each arm."

Mr. Lopardo: "Then what is done, what is next?"

Mr. Callaway: "I did say that it was put on the finished bench; and once more I do look it over, check it for bore, size, and the customer's specifications; and then it goes downstairs to the shipping room."

Mr. Lopardo: "You use in this, is it steel casting?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "This is steel casting, yes."

Mr. Lopardo: "Why do you use steel casting?"

Mr. Callaway: "Well, steel is so much superior to any other type of metal that you would use on there, and we found it satisfactory in all the heads we have made so far."

Mr. Lopardo: "Have you replaced any heads?" [322]

Mr. Olson: I object to that, as being immaterial and irrelevant.

The Court: I will sustain the objection.

Mr. Lopardo: "Then, the claim here in question is the only one that you have ever had?"

Mr. Olson: Same objection.

The Court: Objection sustained. I want you to know this: By objecting to that you deprive yourself of the right to argue. You are not going to make any mention of that.

Mr. Olson: I am not going to make any mention——

The Court: Draw any inference from the fact that if they had made an inspection they could have discovered it.

Mr. Olson: I am afraid I don't understand the court.

The Court: Let it stand as it is. I will not do anything at all. If you make any argument that I think is improper, in view of your objection that you are objecting to the proposition they testified they have never had any complaint about breaking——

(Deposition of Charles E. Meissner.)

Mr. Olson: That is immaterial.

The Court: All right. You are not going to make any comment on that topic, then.

Mr. Olson: I am concerned with his one braking; that is all.

Mr. Lopardo: "Now we have it down at the finished bench, and from there what happens?" [323]

Mr. Callaway: "We have a boy come up with a truck several times a day, and he picks up all these finished jobs, and it goes down in the shipping room; and there it is inspected and packed and checked again."

Mr. Olson: I won't make any objection.

Mr. Lopardo: All right. "How are they packed?"

Mr. Callaway: "That I couldn't say, how they are packed."

Mr. Lopardo: "Were all of these operations performed on the Champion panel head which was shipped to Woodworkers Supply Company?"

Mr. Olson: "Do you know?"

Mr. Callaway: "Yes, they were."

Mr. Lopardo: "Do you know that?"

Mr. Callaway: "I do know; I definitely remember this job, I remember in how big a hurry they were. That is how I connect it with this; and this panel head was made specifically——"

Mr. Olson: No objection.

Mr. Lopardo: "That was sold to Woodworkers Supply Company?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "That is right."

Mr. Lopardo: "In the Champion panel raiser head which was sold to Woodworkers Supply Company, were there any defects in it?" [324]

Mr. Callaway: "No, there was not."

Mr. Lopardo: "You checked that yourself, personally?"

Mr. Callaway: "That is right."

Mr. Lopardo: "And after the completion of each operation, you checked that personally?"

Mr. Olson: "Just a minute. I object to that, as being leading and suggestive."

The Court: Overruled.

Mr. Lopardo: "As to the Champion panel raiser head which was sold to Woodworkers Supply Company, did you perform each of the operations to which you have testified, on that particular head?"

Mr. Olson: "Do you mean did he personally do that?"

Mr. Lopardo: "That's right, as to what he has testified he usually does."

Mr. Callaway: "I personally do that?"

Mr. Lopardo: "That's right; everything you have testified to that you do?"

Mr. Callaway: "I gave it to the engine lathe operator, he performed the operation, yes, if that is what you mean."

Mr. Lopardo: "The men whom you have named——"

Mr. Callaway: "Yes."

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "——they performed the operations on that Champion panel raiser head?"

Mr. Callaway: "That is right." [325]

Mr. Lopardo: "And that Champion panel raiser head, each inspection that you have testified to was made, of that head?"

Mr. Callaway: "That is right; that is correct."

Mr. Lopardo: "And when that Champion panel raiser head left your hands, was it in good condition?"

Mr. Callaway: "It was."

Mr. Lopardo: "Had you at any time had any steel castings from Gunité Foundries which had been defective?"

Mr. Callaway: "No, we have not."

Mr. Olson: "I object to that, on the ground that it is irrelevant and immaterial, tends to prove no issue in this case. I move the answer be stricken."

The Court: The motion will be granted.

Mr. Lopardo: "If there were a bubble in the casting, would that break under the normal use to which these panel raiser heads are put?"

Mr. Olson: "I object to that question, as being so vaguely and ambiguously phrased that it is impossible of an intelligent answer; and furthermore, as invading the province of the jury; and——"

The Court: Overruled.

Mr. Callaway: He reframed it, your Honor.

Mr. Olson: I didn't read the next page. I am sorry.

(Deposition of Charles E. Meissner.)

The Court: All right. [326]

Mr. Callaway: Page 101, starting with "Have you——"

Mr. Lopardo: "Have you performed any tests on these castings which are used on these panel raiser heads?"

Mr. Olson: "What particular castings are you talking about? Or I will object to that."

Mr. Lopardo: "Well, the castings of the same lot from which the Champion panel raiser head was made which was sold to Woodworkers Supply Company."

Mr. Callaway: "Made any tests on any castings?"

Mr. Lopardo: "In other words, have you bored any holes in any of them?"

Mr. Callaway: "Yes, we have."

Mr. Olson: "I object to this, as being irrelevant and immaterial."

The Court: Overruled.

Mr. Lopardo: "And what were the results?"

The Court: They are talking now not about a general operation, but a special operation out of the same metal. Therefore, that is germane to the inquiry here.

Mr. Callaway: "I bored a hole in one of these——"

Mr. Lopardo: "Will you indicate on part 2 of Defendant's Exhibit 1?"

Mr. Callaway: "I bored a hole in here, through this part 2. (Indicating.)"

(Deposition of Charles E. Meissner.)

Mr. Olson: "Indicating the upper cutter, right?" [327]

Mr. Callaway: "That is right."

Mr. Lopardo: "Will you indicate upon the identification mark there the approximate position?"

Mr. Callaway: "I bored a hole in here (indicating) about .200 diameter."

Mr. Lopardo: "Will you mark a circle there?"

Mr. Callaway: "In fact, I bored three different holes."

Mr. Lopardo: "Mark a circle there."

Mr. Callaway: "Right here. (Indicating.)"

Mr. Lopardo: "That is on the identification tag of part 2 of Defendant's Exhibit 1?"

Mr. Callaway: "That is correct."

Mr. Olson: "This is all objected to, as being irrelevant and immaterial."

The Court: Overruled.

Mr. Callaway: "Also, I bored two more holes, one in each of these other arms, directly through here (indicating), the same size diameter."

Mr. Lopardo: "Indicating flush with——"

Mr. Callaway: "With that raise at the bottom."

Mr. Lopardo: "All right."

Mr. Olson: "That is objected to, as being irrelevant and immaterial."

The Court: Overruled. [328]

Mr. Lopardo: "What were the results?"

Mr. Callaway: "I took the same casting, I put

(Deposition of Charles E. Meissner.)

it in a large vise and I hammered on that with a six-pound hammer, using both hands; I could not break that off. I also had another man try it, and he couldn't do it."

Mr. Olson: "That is all objected to, as being irrelevant and immaterial, tending to prove no issue in this case; and the alleged tests which are purported to have been made are not analogous to the claimed defects in the casting in issue here. For all those reasons, I move that the questions and answers be stricken."

The Court: The motion will be denied.

Mr. Lopardo: "And the tests were made upon a casting which came from the same lot?"

Mr. Callaway: "From the same lot; yes, sir."

Mr. Lopardo: "As the Champion panel raiser head which was sold to Woodworkers Supply Company?"

Mr. Callaway: "That is right."

Mr. Lopardo: "And which was the one which is involved in this law suit?"

Mr. Callaway: "Yes, sir."

Mr. Lopardo: "Assuming for the purpose of this question that there was an air bubble in one of the arms of part 2, which did not extend to the surface; would a Champion panel head, if put to normal usage—would it break?" [329]

Mr. Callaway: "That would never break if put to normal use. You are taking such a light cut of this wood. I have taken heavier cuts with fly

(Deposition of Charles E. Meissner.)

cutters, in a milling machine, with a cutter head smaller than that, and it never broke. And here you are just taking a light cut of wood.”

Mr. Olson: “Object to the question and answer; that called for the speculation and conclusion of the witness; on the further ground that the conditions calling for the answer are not sufficiently described so that any intelligent conclusion can be arrived at therefrom; and on the further ground that there is no similarity between the conditions assumed in the question and the conditions existing in the particular head in question at the time it broke or disintegrated. For all those reasons, I move the question and answer be stricken.”

The Court: The motion will be denied.

Mr. Lopardo: “What would cause one of the arms to break?”

Mr. Olson: “I object to that, unless there are some further facts included in the question.”

Mr. Lopardo: “What would be required to cause one of those arms to break?”

Mr. Callaway: “What would cause it to break in operation? If that was not properly set up right, if these two set screws were not fastened right; if the nut on the spindle [330] was not tight enough.”

Mr. Lopardo: “The Champion panel raiser head which was sold to Woodworkers Supply Company, if one of the arms on that broke, would that break in normal usage?”

(Deposition of Charles E. Meissner.)

Mr. Callaway: "That would not break in normal usage, taking a light cut out of wood, like it was supposed to."

Mr. Lopardo: "And if it broke, what would cause it to break?"

Mr. Olson: "I move that the question and answer be stricken, on the ground that it calls for the pure conclusion of the witness; and there are too few facts assumed in the question to enable the witness to base an intelligent judgment; in other words, the answer is nothing but the speculation and conclusion of the witness; and I therefore move it be stricken."

The Court: I think that last question——

Mr. Callaway: He reframed it.

Mr. Olson: I am sorry.

Mr. Lopardo: "All right; we will amend the question: And if it broke, what could cause it to break?"

Mr. Olson: "That is still subject to my objection; I object, that there are not sufficient elements included in this question so it can be answered intelligently."

The Court: I think that question is too speculative. I will sustain the objection to that question. [331]

Mr. Callaway: "It might have been misused, improperly."

Mr. Olson: That is the same answer to the same question.

(Deposition of Charles E. Meissner.)

Mr. Callaway: There is no objection made in the record.

Mr. Olson: I just made one.

Mr. Lopardo: That was to the previous part of it.

Mr. Olson: You haven't read anything else. Mr. Hubbard said, "You have made your objection three times. May we have an answer to the question?" You can't give that answer. He says, "What else?"

The Court: I will sustain the objection to the question.

Mr. Olson: You can't say, "What else?" to an answer he can't give.

I think the next question should start, "Then, in the Champion panel raiser head which was sold to Woodworkers Supply Company——"

Mr. Lopardo: "Then, in the Champion panel raiser head which was sold to Woodworkers Supply Company, which is involved herein, if that had been subjected to normal use your answer is there would be no breakage?"

Mr. Callaway: "There could not be."

Mr. Olson: The same objection, leading and suggestive; very leading.

The Court: I will sustain that objection. The other calls for experimental testimony; this does not.

Mr. Lopardo: "Do you have an opinion as to the Champion [332] panel head which was sold to

(Deposition of Charles E. Meissner.)

Woodworkers Supply Comany, and which is involved herein, knowing about the claim which is being made here that it broke?"

Mr. Callaway: "Well, I think head went through some severe punishment, in order to force this all the way back to here. (Indicating.)"

Mr. Olson: "I object to the question, and move the answer be stricken on the ground that the question calls for and the witness has given pure speculation and conclusion in the answer. He has not sufficient facts to express an intelligent opinion, and he does not attempt to express an intelligent opinion, but a mere conclusion."

The Court: Yes. I think that question is improper. The objection will be sustained.

Mr. Lopardo: "The normal position of the panel raiser head is how?"

Mr. Callaway: "The way it is setting there is the normal position. (Indicating.)"

Mr. Lopardo: "You will have to describe that for us."

Mr. Callaway: "These knives on part 2 are in between the knives on part 1."

Mr. Lopardo: "If they are directly opposite each other, is that a normal position?"

Mr. Callaway: "That is not a normal position; they will hit when located that way." [333]

Mr. Lopardo: "And can it be operated at any time where they are directly opposite each other?"

Mr. Callaway: "It could not be operated that way."

(Deposition of Charles E. Meissner.)

Mr. Lopardo: "And if they were directly opposite each other, what would that indicate to you?"

Mr. Olson: "I object to that, as being a pure conclusion of the witness; there is no claim they were ever opposite each other, and there is no evidence before us that they were——"

The Court: I will sustain the objection to the last question.

Mr. Lopardo: "If the two were directly opposite each other, what would happen to the pin in the slot?"

Mr. Olson: Same objection.

The Court: The objection is sustained.

Mr. Lopardo: "Could the panel raiser head operate?"

Mr. Callaway: "That panel raiser head could not operate that way."

Mr. Lopardo: "That is, where they are directly opposite each other?"

Mr. Callaway: "Yes."

Mr. Lopardo: "Is there additional reason why they could not operate?"

Mr. Olson: I say these questions lead on to the same question. [334]

The Court: No. The method of operation is different. This last question is objectionable. I will sustain the objection to that.

Mr. Lopardo: There is none in the record.

Mr. Olson: There was none in the record. I say the objection I made, which was sustained, goes to all the following questions.

(Deposition of Charles E. Meissner.)

The Court: No. I will allow that to go in. The reason I sustained the other objection was it was merely a completed answer to a question as to which objection had been sustained. There is no objection to that last question. I would not allow it, anyhow.

Mr. Olson: There is an objection on page 109. The same objection to all these questions.

“I make the same objection to all of these questions, since my last objection; and again that these answers be stricken.”

The Court: Then the objection to the last question will be sustained.

Mr. Callaway: Your Honor, it isn't made until after several more questions are answered.

The Court: You see, you gentlemen have taken my copy.

Mr. Callaway: The question is, the one he is objecting to is the first one at the top of the page.

Mr. Olson: It all goes to the fact that there is no [335] evidence the blades were in the position they are talking about at the time.

Mr. Callaway: What about——

The Court: This is a *res ipsa loquitur* case. When the plaintiff relies on that, I believe a greater latitude should be allowed to the defendant in explaining the operation of the machine, in response to the inference drawn from the mere happening of the accident.

What answer are you talking about?

(Deposition of Charles E. Meissner.)

Mr. Callaway: We are talking about the first question and the first answer on the page.

The Court: I will merely sustain objections to particular questions that are made.

Mr. Lopardo: I will repeat the question.

"Is there additional reason why they could not operate?"

Mr. Callaway: "If they were in that position this top head detail, it would not be fastened on part 1."

Mr. Lopardo: "Would there be any clearance between the knives?"

Mr. Callaway: "There wouldn't be any clearance."

Mr. Lopardo: "By that what do you mean?"

Mr. Callaway: "This knife would be directly above here (indicating); there wouldn't be clearance enough for your panel to be raised in between those two knives."

Mr. Olson: There is an objection there for the same [336] reason, your Honor, that question and answer—move the answer be stricken. It assumes facts not in evidence.

Mr. Callaway: It is merely telling how the thing operates; why it couldn't operate.

Mr. Olson: There is no testimony anywhere in the record it was in that condition when it was operating.

The Court: There is not any evidence it was in any condition. The testimony is something hap-

(Deposition of Charles E. Meissner.)

pened. He has a right to testify how this instrument operates.

Mr. Olson: Not improperly.

The Court: He is not doing it improperly.

Mr. Olson: He is assuming that the arms were parallel to each other when it was in operation.

The Court: There is no objection to the particular question.

Mr. Olson: Yes, page 109, in the middle of the page.

The Court: You cannot object to questions that precede——

Mr. Olson: I am only objecting to the last question preceding. The others have been read. No objection was made.

The Court: This is an answer he has made. There is no objection to the question until after the answer has been given. About line 9 there is a question, "By that what do you mean?"

The answer is, "This knife would be directly above here [337] (indicating); there wouldn't be clearance enough for your panel to be raised in between those two knives."

Then Mr. Johnston says, "I make the same objection to all of these questions, since my last objection; and again that these answers be stricken." The motion will be denied.

You cannot save up your objections and then put them back in.

Mr. Olson: I understood your Honor to mean

(Deposition of Charles E. Meissner.)

with the last ruling. I agree with you, that I could only make the objection before——

The Court: Go ahead.

Mr. Lopardo: “And if the panel raiser head with the two knives were exactly opposite each other, in other words, part 2 and part 1, would that cause one of them to break?”

Mr. Callaway: “Yes, it would.”

Mr. Olson: I object on the same ground. There is no objection in the record.

The Court: No. The objection is overruled.

Mr. Olson: There is objection——

The Court: If there is, it is overruled. In answering the prima facie inference, from the mere happening of the accident, they have a right to go into detail to show how this machine operates and what would or what would not happen if it were used in the proper manner.

Mr. Olson: Your Honor, I agree with you. I don't want to take the time of the court. I am not arguing with your [338] ruling. I don't know whether I understand you or not.

My objection, and the objection in this record, is not to the form of the question nor to the answer. It is just to the fact that all these questions are asked as to what would happen to the panel raiser head if it were operated with the arms parallel.

The Court: This is a standard machine. Any man who is concerned with the operation of the

(Deposition of Charles E. Meissner.)

machine has a right to show how it operates in a normal fashion.

Mr. Olson: I agree with you. This is not in normal fashion. They are talking about the arms being parallel. The arms aren't parallel.

The Court: That is a question of argument.

Mr. Olson: There is an abundance of evidence in this record to show that the arms were not in the position they are stating.

The Court: You can argue that to the jury.

Mr. Olson: It is assuming facts not in evidence.

The Court: I know what I am doing. Go ahead.

Mr. Lopardo: "Why?"

Mr. Callaway: "It would automatically throw this top head against the lower one, causing one arm to snap off."

Mr. Olson: I won't object.

Mr. Lopardo: "Henry Danielson, are you familiar with what his experience has been?" [339]

Mr. Callaway: "Yes, I am."

Mr. Olson: "I object to that, as not being the best evidence."

The Court: That is merely a general inquiry as to how long he has worked, as to his experience.

Mr. Lopardo: "What has been his experience?"

Mr. Callaway: "He came to Woodworkers Tool Products well recommended; he worked at Klein Electric before he came to Woodworkers Tool Works. Before that he operated his own machine shop."

(Deposition of Charles E. Meissner.)

Mr. Olson: "I move the answer be stricken."

The Court: The part that he came well recommended may be stricken out. The remainder may remain. It gives his length of experience.

Go down to "He has been employed by Woodworkers Tool Works how long?"

Mr. Lopardo: "He has been employed by Woodworkers Tool Works how long?"

Mr. Callaway: "I would say about two or two and one-half years."

Mr. Lopardo: "During that time you have had occasion——"

Mr. Olson: Go ahead.

Mr. Lopardo: "During that time have you been in a position to observe his work?"

Mr. Callaway: "Yes, I have; his work is of the best." [340]

Mr. Olson: "That is objected to as irrelevant and immaterial."

Mr. Lopardo: All we are trying to show——

Mr. Callaway: Let's don't argue.

The Court: That may be stricken. It is merely a characterization. That may be stricken, and the jury instructed to disregard that.

Mr. Callaway: "Victor Barron is a good milling machine operator."

Mr. Loapardo: "He has been with your company how long?"

Mr. Olson: Excuse me. I am a little slow. The same objection, a conclusion of the witness, that

(Deposition of Charles E. Meissner.)

he is a good millman. That is not the best evidence, what his opinion on him is.

The Court: Is there an objection in the record on that?

Mr. Olson: Yes, there is.

The Court: That may be stricken. The length of time, it all goes to the care taken in making inspections of the material, so length of time of employment is material.

Mr. Lopardo: "He has been with your company how long?"

Mr. Callaway: "About two years."

Mr. Lopardo: "Has he been under your direct supervision?"

Mr. Callaway: "He has been under my direct supervision, yes."

Mr. Olson: I want to make the general objection again, [341] that all this is hearsay, not the best evidence, and irrelevant and immaterial. I move that the answer be stricken.

The Court: The motion will be denied.

Mr. Lopardo: "The men who performed each step in the operation of the manufacture of the Champion panel raiser head are skilled workmen, is that correct?"

Mr. Callaway: "They are."

Mr. Olson: "Object to that, as the conclusion of the witness; I move the answer be stricken."

The Court: That is a conclusion. That may be stricken. He has already told us how long they

(Deposition of Charles E. Meissner.)

were employed and what their experience has been.

Mr. Lopardo: "And you know that of your own knowledge, do you?"

The Court: That would follow.

Mr. Olson: Same objection. Same motion made.

The Court: I will sustain the objection.

Mr. Olson: That is all of direct examination. I am not going to start the first part here.

Mr. Callaway: I don't blame you. I would leave that out, too.

Mr. Olson: Page 113, about the middle of the page.

Cross-Examination

"How many orders for Champion panel raiser heads have you had in the past five years that you have been with Woodworkers Tool Works? [342]

Mr. Callaway: "I have had about one hundred orders."

Mr. Olson: "You wouldn't say it would be 150?"

Mr. Callaway: "No."

Mr. Olson: "Or 50?"

Mr. Callaway: "No."

Mr. Olson: "And do you recall the details of every one of those one hundred orders?"

Mr. Lopardo: I object to that, your Honor. It is not material. It is irrelevant.

The Court: Oh, no. It goes to his recollection. He has testified that he remembered the particular order, because it is a special order. Then they may

(Deposition of Charles E. Meissner.)

ask him if he remembers any others.

Mr. Callaway: "I can't name all the customers, no."

Mr. Olson: "And you cannot recall all the details of each of those orders?"

Mr. Callaway: "I cannot recall all the details of a hundred orders, no."

Mr. Olson: "But you do remember this particular order?"

Mr. Callaway: "I remember this particular one."

Mr. Olson: "Your memory in this particular case was greatly refreshed after you found a law suit had been brought against Woodworkers Tool Works?"

Mr. Lopardo: I object.

Mr. Callaway: Waive the objection. Let's go on. Let's [343] get the answer.

"No, that is not correct. I found those castings came in, I had been waiting for these castings on this specific order, because we had several calls from customers out there."

Mr. Olson: "What is the name of the clerk in the tool room who checked these castings for weight when they came in?"

Mr. Callaway: "George Macek."

Mr. Olson: The bottom of the page, now.

Mr. Callaway: Don't leave this out. I didn't mind your leaving out the first, because I thought it was a lot of folderol your attorney was indulging in. Let's read the rest of this.

(Deposition of Charles E. Meissner.)

Mr. Olson: This is my cross-examination.

The Court: You can offer it later on.

Mr. Olson: I am glad you asked that. I will read it. If you are going to read it, I have no objection to reading it. I did forget something I want to read back there on page 103.

The Court: Do not mark on the original.

Mr. Callaway: Mr. Lopardo will read it.

Mr. Olson: I want to go to page 103.

Mr. Callaway: Let's do one thing at a time.

Mr. Olson: This is more of the sequence. If I do it now, I will have it over with. It is only a few questions, [344] regarding this test that was made. Mr. Johnston asked a question I want to put in evidence. You recall the testimony on the hammering of the piece that didn't break. Line 7, page 103. No; it is line 18 on page 103.

"What was the date of these tests?"

Mr. Callaway: "I tried that out this morning."

Mr. Olson: "Is that when you made the tests?"

Mr. Callaway: "Yes, I tried it out this morning."

Mr. Olson: That is what I wanted. Now, page 114.

"And you cannot recall all the details of each of those orders?"

Mr. Callaway: No, no.

Mr. Olson: I am sorry.

Mr. Callaway: It is after the answer about George Macek.

Mr. Olson: "You are sure he was there and

(Deposition of Charles E. Meissner.)

working for the company?"

Mr. Callaway: "Yes, I am."

Mr. Olson: "That was in October, 1948, I believe?"

Mr. Callaway: "Chaps who have been in our employ about 12 years."

Mr. Olson: "What was the name of the engine lathe man you testified you gave the castings to?"

Mr. Callaway: "Henry Danielson."

Mr. Olson: "Do you remember the names of all the other men that performed the various operations?" [345]

Mr. Callaway: "I do."

Mr. Olson: "Every one of them?"

Mr. Callaway: "I do know all the names."

Mr. Olson: "You have a very clear picture in your mind as you sit there, of each of the things you did?"

Mr. Callaway: "Yes, I do; I have a clear picture."

Mr. Olson: "You saw each and every one of them?"

Mr. Callaway: "That is right."

Mr. Olson: "During all of these various operations you have described?"

Mr. Callaway: "Yes."

Mr. Olson: "Is that right?"

Mr. Callaway: "That is right."

Mr. Olson: "Is that your custom in making up orders for various tools that are received by your company?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Yes."

Mr. Olson: "Is that right?"

Mr. Callaway: "That is right."

Mr. Olson: "You stand and watch every operation, is that right?"

Mr. Callaway: "I give this engine lathe operator this head——"

Mr. Olson: "No, answer my question: Do you stand and watch every operation?"

Mr. Callaway: "That would be an impossibility; I have [346] about twenty men."

Mr. Olson: "In this particular case, however, you stood and watched every operation from the beginning to end; and you have a very clear memory of it, is that right?"

Mr. Callaway: "I did not stand and watch every operation from beginning to end, no."

Mr. Olson: "Then you want to change the testimony you gave a few moments ago, to the effect that you did see every operation from beginning to end?"

Mr. Callaway: "I remember giving this casting to Henry Danielson——"

Mr. Olson: "No, answer my question."

Mr. Lopardo: "I submit, he has answered."

Mr. Olson: "Read the question."

Mr. Callaway: "I did not see every operation from beginning to end."

Mr. Olson: "You did not?"

Mr. Callaway: "Not every operation, no."

(Deposition of Charles E. Meissner.)

Mr. Olson: "Then you want to change the form of your testimony?"

Mr. Callaway: I submit this is arguing with the witness.

Mr. Olson: There is no objection in the record.

Mr. Lopardo: "Are you restricting that to the particular Champion panel raiser head which was sold to the Woodworkers Supply Company?" [347]

Mr. Olson: "That is right."

"All right."

"You want to change that answer now?"

Mr. Callaway: "When I referred to that I was referring——"

Mr. Olson: Where are we reading?

Mr. Callaway: You are just reading a lot of stuff between attorneys.

Mr. Olson: There is no objection in the record. I want this in the record.

"You want to change that answer now?"

Mr. Lopardo: "Did you understand the question applied to the specific head which was sold to the Woodworkers Supply Company?"

Mr. Olson: "That is the only one he described the operations on."

"You want to change that?"

Mr. Callaway: "When I referred to that I was referring to engine lathe; now then you asked me the next operator—I remember the engine lathe operator machining this casting."

Mr. Olson: "You now say you did not see every

(Deposition of Charles E. Meissner.)

single operation from beginning to end, on this particular head?"

Mr. Callaway: "Are you talking about all the operations, or the operation on the lathe?"

Mr. Olson: "The question speaks for itself: Do you now [348] want to change that testimony?"

Mr. Lopardo: I object to that, your Honor, on the ground he is arguing with the witness.

The Court: I will sustain the objection.

Mr. Olson: He won't give an answer.

The Court: He is trying to get the witness to admit his testimony now is different from what he had given. Having attempted three or four times, and not succeeding, I will sustain the objection to that inquiry.

Mr. Olson: "And you remember every operation that was performed on it, do you?"

Mr. Callaway: "All the heads are the same."

Mr. Olson: I didn't see the objection on the other page, I am sorry.

"Oh, so you are not depending on a particular recollection of these particular operations on the Champion panel raiser head that is in issue here; you are depending on your memory of operations of this kind or type, on this kind or type of panel raiser head; isn't that right?"

Mr. Lopardo: "I object."

Mr. Callaway: The objection will be waived.

"I am referring to this specific head here."

Mr. Olson: "You remember all of those operations?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "I am speaking about——"

Mr. Olson: I didn't have a question. You just went on. [349]

There was an objection you waived and then the question was read.

Mr. Callaway: "I am speaking about this particular head."

Mr. Olson: "You remember all of those operations?"

Mr. Callaway: "I remember those operations."

Mr. Olson: "And it is not because they are the same general type of operations that you saw many other times on my other heads, is that right?"

Mr. Lopardo: I object to that on the ground he is arguing with the witness again, your Honor.

The Court: It is all right.

Mr. Callaway: "I remember this engine lathe operator turning this head; then it was given to the milling machine operator."

Mr. Olson: "You are not answering the question;—will you read the question?"

The question is read.

"Now, answer that question, please: Is it the many operations you are remembering,—just yes or no?"

Mr. Callaway: "That question is not clear; I remember this distinct operation on the lathe."

Mr. Olson: "That one single operation?"

Mr. Callaway: "That one single operation on this lathe."

(Deposition of Charles E. Meissner.)

Mr. Olson: "But you don't remember all the different [350] operations, all the way through, on this particular head, do you?"

Mr. Callaway: "Well, I gave it to the milling machine operator——"

Mr. Olson: "Do you remember all those operations, or don't you; yes or no, all those operations? Right now, as you sit here, you don't remember those operations, all of them, do you?"

Mr. Callaway: "Not every one, no; not on this particular head, except on the turning of the lathe."

Mr. Olson: "Just that one operation?"

Mr. Callaway: "That is right."

Mr. Olson: "Then, some six or seven or nine that you described,—I think it was about nine, wasn't it?"

Mr. Callaway: "About seven, I would say."

Mr. Olson: "So you remember one distinctly?"

Mr. Callaway: "I remember the turning on the lathe distinctly."

Mr. Olson: "The rest of them, you remember just the general operation that was performed on all heads of that kind, right?"

Mr. Callaway: "Right."

Mr. Olson: Page 121.

"How long did all of these various operations take, from the beginning to the end of the manufacture or the fabrication [351] or processing, or whatever you would call it, by your company, of this particular Champion panel raiser head?"

Mr. Callaway: "Are you talking about one or a group now?"

(Deposition of Charles E. Meissner.)

Mr. Olson: "The entire, all of the operations from beginning to end, on one head? Do you call these two separate heads? They are all one?"

Mr. Callaway: "We might run more than one."

Mr. Olson: "Is this one head? (Indicating.)"

Mr. Callaway: "That is one head; but we might make more than one."

Mr. Olson: "Does it take an hour, two hours, or two days?"

Mr. Callaway: "Say about five hours, or more."

Mr. Olson: "Five hours or more?"

Mr. Callaway: "Yes."

Mr. Olson: "If you spent the entire five hours or more that it takes to perform the nine operations you mentioned on this head, you would not do anything else on that day, would you; isn't that true? Answer that yes or no; there wouldn't be time for you to do anything else, would there?"

Mr. Callaway: "Yes."

Mr. Olson: "What else would you be able to do?"

Mr. Callaway: "I could supervise the setting up on this."

Mr. Olson: "Just glance at it every ten, fifteen minutes?" [352]

Mr. Callaway: "No, I would see that it is set up properly."

Mr. Olson: "Just glance at it once in a while?"

Mr. Callaway: "I could check it."

Mr. Olson: "Then, you didn't watch it in this particular case all the way through?"

(Deposition of Charles E. Meissner.)

I won't get into that.

Mr. Callaway: I don't think that question was ever answered.

Mr. Olson: Let's start on page 123, at the bottom, about three-quarters of the way down. It was answered.

Mr. Callaway: "Yes, they are checked after each operation."

Mr. Olson: Where are you reading?

Mr. Callaway: At the bottom of page 123.

Mr. Olson: I don't see where you are reading, Mr. Callaway.

Mr. Callaway: The bottom of page 123.

Mr. Olson: I am going before that. Just above that.

"Aside from the tests you performed this morning on a casting which you say is similar to the one from which you say this head was made, you never tested any castings out of that batch, did you?"

Mr. Callaway: "Yes, they are checked after each operation." [353]

Mr. Olson: "Tests made; what tests are made?"

Mr. Callaway: "Checked and inspected."

Mr. Olson: "I didn't ask anything about checking and inspecting; I asked you if any other tests were made."

Mr. Callaway: "No; it is not necessary in a casting like this."

Mr. Olson: "I didn't ask that, and I move the

(Deposition of Charles E. Meissner.)

answer be stricken, as not responsive. Did you make any tests?"

Mr. Callaway: It was asked again.

Mr. Olson: "Did you make any tests of any kind?"

Mr. Callaway: "It was not necessary; no."

Mr. Olson: "All right, the answer is no, is that right; is that correct?"

"Up until this morning you made no tests on any of these castings, is that correct?"

"That check was this morning, wasn't it?"

Mr. Callaway: "Yes, that check was this morning."

Mr. Olson: "And that was the first check you made, you; was that the first test you made?"

Mr. Callaway: "I made, yes."

Mr. Olson: "Did anybody make any tests, up until that time, for your company, either by X-ray, radiogram, magnaflux, or anything of that sort, do you know?"

Mr. Callaway: "Yes, we had them X-rayed."

Mr. Olson: "When?" [354]

Mr. Callaway: "I don't know when these X-rays were made."

Mr. Olson: "Did they find any air bubbles in them?"

Mr. Callaway: "Not one."

Mr. Olson: "Any other defects?"

Mr. Callaway: "No."

Mr. Olson: "When were these tests made?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "I don't know when."

Mr. Olson: "Who made them?"

Mr. Callaway: "I would have to look up the records to find that out."

Mr. Olson: "Were they made within the last month?"

Mr. Callaway: "Oh, they were made previous."

Mr. Olson: "Approximately what date?"

Mr. Callaway: "I couldn't say."

Mr. Olson: "Do you have a report on those tests, your company, I mean?"

Mr. Callaway: "They may have."

Mr. Olson: "You saw the report, did you?"

Mr. Callaway: "No, I didn't see that."

Mr. Olson: "You didn't see the report?"

Mr. Callaway: "No."

Mr. Olson: "And what is your job, production superintendent?"

Mr. Callaway: "Plant superintendent." [354]

Mr. Olson: "And you never saw the report?"

Mr. Callaway: "No, I didn't see the report."

Mr. Olson: "You know that the test was made?"

Mr. Callaway: "They were made."

Mr. Olson: "And you know that a report was made, and you didn't see it?"

Mr. Callaway: "That is right."

Mr. Olson: "You didn't concern yourself with it?"

Mr. Callaway: "Well, they were just pronounced o.k."

(Deposition of Charles E. Meissner.)

Mr. Olson: "So you took it for granted that whoever told you had read the report correctly?"

Mr. Callaway: "That is right."

Mr. Olson: "You don't know whether it was correct, or not; or whether he read it correctly?"

Mr. Callaway: "Well, that is what they are paid for."

Mr. Olson: "If I understand correctly, when you get these castings from the Gunitite Foundries, in Rockford, Illinois, you just take it for granted that they are all right, unless something turns up in your inspection to show otherwise; is that right?"

Mr. Callaway: "Yes; they are a reputable manufacturer."

Mr. Olson: "You do not X-ray each individual batch of castings, do you, or magnaflux them?"

Mr. Callaway: "Not magnaflux."

Mr. Olson: "Do you X-ray each batch of castings, as they [356] come in?"

Mr. Callaway: "No, not each batch."

Mr. Olson: "But you do X-ray some batches?"

Mr. Callaway: "Some of them were X-rayed, yes."

Mr. Olson: "But not until after this claim about defect occurred?"

Mr. Callaway: "I don't know when it occurred."

Mr. Olson: "Well, it occurred on the 28th day of October, 1948."

Mr. Callaway: "That I couldn't say."

Mr. Olson: "And the X-ray tests you are talk-

(Deposition of Charles E. Meissner.)

ing about were made in the last month or two, weren't they?"

Mr. Callaway: "No, they were not; they were made previous to that."

Mr. Olson: "How far previous?"

Mr. Callaway: "I don't know how far back."

Mr. Olson: "Six months ago?"

Mr. Callaway: "I couldn't say how far back."

Mr. Olson: "Didn't you know when they were made?"

Mr. Callaway: "No, I don't know when they were made."

Mr. Olson: "Did you know at the time they were made, whenever that was?"

Mr. Callaway: "I know about the time, yes."

Mr. Olson: "Now, you know about those details on those nine operations on these particular castings, but you don't [357] know when the tests were made, whether the tests were made after the defect developed?"

Mr. Callaway: "This is my job, to know about all these operations; I assign these jobs out."

Mr. Olson: "When you fall down on your job, you are interested in tests to see if you are doing the job correctly?"

Mr. Callaway: "Yes, I am interested in that."

Mr. Olson: "But you don't know when the test was made?"

Mr. Callaway: "I don't know when the test was made."

(Deposition of Charles E. Meissner.)

Mr. Olson: "Actually, you don't know when the tests were made?"

Mr. Callaway: "I don't know."

Mr. Olson: "But your memory is pretty good, I might say marvelous."

Mr. Callaway: "I just happen to remember that one incident, this customer was waiting for those castings, he had a couple of letters in there on it."

Mr. Olson: "Now let me ask you this: You understand the meaning of the word 'void' in a casting?"

Mr. Callaway: "Void, meaning not any good?"

Mr. Olson: "No, meaning a crack or a fissure."

Mr. Callaway: "I know a crack; fissure I never heard."

Mr. Olson: "Did you ever hear of a void in a casting?"

Mr. Callaway: "I never heard that." [358]

Mr. Olson: "You know what an air bubble or a gas bubble is?"

Mr. Callaway: "Yes, I do."

Mr. Olson: "And that is the same thing, I believe, as a gas pocket, or void is the same—well, you don't know the meaning of the word void?"

Mr. Callaway: "If it is the same as gas pocket——"

Mr. Olson: "A gas pocket, however, is simply a little aperture in the material?"

Mr. Callaway: The lawyer is doing all the testifying there.

(Deposition of Charles E. Meissner.)

Mr. Olson: Let's not have any comment. I could read some other comments from the lawyers. Will you read from page 130, Mr. Callaway, at the eleventh line?

Mr. Callaway: "What are you asking me?"

Mr. Olson: "It is a little crack or a fissure, isn't that correct,—a little space where the material is not solid?"

Mr. Callaway: "That would be right, yes; an air bubble, a little pocket."

Mr. Olson: "You didn't make any tests on these castings from which the casting that was used in the head in question came, for phosphorus or sulphur contents, did you,—or the company?"

Mr. Callaway: "None to my knowledge, no."

Mr. Olson: "If they had been made you would have known that, with your good memory and your knowledge of all these steps?"

Mr. Callaway: "Yes, I would."

Mr. Olson: "If it developed that the phosphorus content in the panel raiser head in question was as high as .072 per cent, whereas in the other arm it was .039 per cent, would that indicate anything to you?"

Mr. Callaway: "That would not; I am not a metallurgist."

Mr. Olson: "And would you know when the phosphorus percentage or content was high and when it was low?"

Mr. Callaway: "I would not."

(Deposition of Charles E. Meissner.)

Mr. Olson: "Or the sulphur content?"

Mr. Callaway: "No."

Mr. Olson: "And if the sulphur and phosphorus content, or either one of them, or silicon content, were high, you do know that would make the casting brittle?"

Mr. Callaway: "No, I wouldn't know; I am not a metallurgist."

Mr. Olson: "And you made no tests for sulphur, phosphorus or silicon content of those castings?"

Mr. Callaway: "No; I said no."

Mr. Olson: "Do you know what inclusion in a casting is, or porosity?"

Mr. Callaway: "Porosity, are you talking about density [360] now, when you say porosity?"

Mr. Olson: "Well, I don't know, to be honest with you."

Mr. Callaway: "I wouldn't know, no."

Mr. Olson: "Now, blow-holes, gas-holes, and air-holes all have the same effect on the metal; is that correct?"

Mr. Callaway: "They would."

Mr. Olson: "They are all substantially the same?"

Mr. Callaway: "Yes, they are all the same."

Mr. Olson: "Now, if you found blow-holes in any of these castings, did you use the casting, or discard it?"

Mr. Callaway: "That was immediately discarded."

(Deposition of Charles E. Meissner.)

Mr. Olson: "And there were some of them in this particular batch which were discarded because of blow-holes; is that correct?"

Mr. Callaway: "There was none."

Mr. Olson: "None of them?"

Mr. Callaway: "No."

Mr. Olson: "Blow-holes are structural defects in steel of this type, are they not?"

Mr. Callaway: "A blow-hole is a structural defect in any steel."

Mr. Olson: "And a blow-hole in steel of this type, if large enough, will be a very dangerous condition; is that not true?" [361]

Mr. Callaway: "No, I wouldn't say it would be a dangerous condition."

Mr. Olson: "No matter how large they are?"

Mr. Callaway: "No matter how large they are."

Mr. Olson: "Or how small?"

Mr. Callaway: "Or how small."

Mr. Olson: "Or how many there are, or how few there are?"

Mr. Callaway: "No."

Mr. Olson: "They are still not a dangerous condition?"

Mr. Callaway: "They are still not dangerous; does he say——"

Mr. Olson: "And they don't constitute a dangerous or structural defect in the steel?"

Mr. Callaway: "No."

Mr. Olson: "You are sure of that?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Not in this particular instance."

Mr. Olson: "Now, wouldn't the blow-holes, if they were either large or if there were a number of them,—wouldn't they reduce the strength of the steel?"

Mr. Callaway: "It would weaken it, but it would not weaken it to the point where it would be dangerous."

Mr. Olson: "That is your answer?"

Mr. Callaway: "That is my answer."

Mr. Olson: "You are sure of that?"

Mr. Callaway: "I am sure of that." [362]

Mr. Olson: "Under no circumstances could a blow-hole weaken the steel to the point where it would constitute a dangerous structural defect?"

Mr. Lopardo: I will have to object to that unless he restricts it to the same casting in issue here.

Mr. Olson: This is cross-examination.

The Court: Go ahead. He may answer.

Mr. Olson: "Will you answer the question, please?"

Mr. Callaway: "I have never seen one in a panel raiser head."

Mr. Olson: Page 137.

Mr. Callaway: No.

Mr. Olson: Oh, yes. Page 136, line 20.

"You have seen blow-holes in the steel, in other metals?"

Mr. Callaway: "I have seen it in cast iron, not cast steel."

(Deposition of Charles E. Meissner.)

Mr. Olson: "Never seen it in steel?"

Mr. Callaway: "Never seen it in steel."

Mr. Olson: "Under no circumstances could a blow-hole weaken a steel casting to the point where it would constitute a dangerous structural defect?"

Mr. Callaway: "No, it could not; not the way that was manufactured; it would be impossible."

Mr. Olson: "Cast steel?"

Mr. Callaway: "That is right." [363]

Mr. Olson: "In making that answer you are depending on your knowledge of the Gunité Foundries, and the type of steel foundry, and on the castings they furnished; is that right?"

Mr. Callaway: "That is right."

Mr. Olson: "Rather than on your own knowledge?"

Mr. Callaway: "I am depending on them, as well as my own knowledge; because I know them to be a good manufacturer of these steel castings, good clean castings."

Mr. Olson: "And you know of your own knowledge that blow-holes could not constitute a structural dangerous condition on steel castings of this type?"

Mr. Callaway: "That is right; they could not."

Mr. Olson: "Now, blow-holes can be ascertained by magnafluxing or taking X-rays; is that correct?"

Mr. Callaway: "A magnaflux is a test for crack."

Mr. Olson: "Would it not also show up blow-holes, if they were to the surface?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "If they were to the surface, yes."

Mr. Olson: "And X-rays would show up blow-holes and cracks, both, would it not?"

Mr. Callaway: "That is right. I am just basing my knowledge on what I know of X-raying steel."

Mr. Lopardo: "You don't have any experience with that?"

Mr. Callaway: "No, I don't." [364]

Mr. Olson: "But you never used, in connection with your company here, the defendant, either of those tests, magnaflux or X-ray?"

Mr. Callaway: "Not magnaflux; we discussed X-rays more already."

Mr. Olson: "Did you ever use X-rays?"

Mr. Callaway: "I don't know how to use an X-ray machine."

Mr. Olson: "Did your company, as a matter of practice, during the time you got these castings in and had them in your storage bin, ever have them X-rayed, aside from this one time trying to determine whatever you mentioned here a while ago, the date of which——"

Mr. Callaway: "I don't know the date."

Mr. Olson: "Was the particular casting from which this particular panel raiser head in question was manufactured, was that casting ever X-rayed, to your knowledge, by anybody in connection with your company, or for your company; yes or no?"

Mr. Callaway: "This particular one?"

(Deposition of Charles E. Meissner.)

Mr. Olson: "Yes."

Mr. Callaway: "No, it was not X-rayed."

Mr. Olson: "Was it tested in any other way for blow-holes, or anything else of that kind?"

Mr. Callaway: "It was inspected and checked for blow-holes during the operations." [365]

Mr. Olson: "Was any test made with magnesium—was any test made for magnesium, phosphorus or sulphur content in that particular casting?"

Mr. Lopardo: That is objected to on the ground that question has been asked already.

Mr. Olson: I think it has.

The Court: All right.

Mr. Olson: "You have no knowledge of the tests that were made at the foundry at all, do you?"

Mr. Callaway: "No."

Mr. Olson: "Well, were any tests made by or for your company which would determine what the composition of the casting in question was, prior to the time you made it up?"

Mr. Lopardo: I object to that on the ground it has already been answered.

Mr. Olson: That one hasn't.

Mr. Lopardo: I would like to object on the further ground, your Honor—

Mr. Callaway: It has already been sustained and withdrawn.

Mr. Olson: That is a different question, Mr. Callaway.

Mr. Callaway: I don't know where you are.

(Deposition of Charles E. Meissner.)

Mr. Olson: The question I withdrew is not the question I just asked.

Mr. Callaway: Where are you?

Mr. Olson: I am on page 140 at the bottom.

“Well, were any tests made by or for your company which would determine what the composition of the casting in question was, prior to the time you made it up?”

Mr. Callaway: “When I placed this order I order cast steel.”

Mr. Olson: “Yes; did your company make any test of the composition of that casting, after you got it,—the composition of the casting?”

Mr. Callaway: “After we got it?”

Mr. Olson: “After you got it?”

Mr. Callaway: “No.”

Mr. Olson: “At any time before the head was delivered, were any tests made of the composition of the casting?”

Mr. Callaway: “Not to my knowledge.”

Mr. Olson: “If there had been any such tests, you would have known about them, would you?”

Mr. Callaway: “Yes, I would say so.”

Mr. Olson: “It was not the standard practice, though, to make any tests?”

Mr. Callaway: “No. I might add, it was not necessary, out of cast steel.”

Mr. Olson: “Was an open hearth or electric furnace used in casting the steel; do you know which one was used?”

(Deposition of Charles E. Meissner.)

Mr. Callaway: "That I cannot say, how that metal was prepared." [367]

Mr. Olson: "Don't you know that the electric furnace method is far superior?"

Mr. Callaway: "I am no foundry man, as well as metallurgist."

Mr. Olson: "Then your answer is, you don't know, all right."

Then the question: "What was the method of casting employed; were steel molds or centrifugal casts used?"

Mr. Callaway: "I cannot say what their methods of casting it are."

Mr. Olson: "You don't know if centrifugal casts were used the segregation in the metal would be less; you don't know that?"

Mr. Callaway: "I could not say."

Mr. Olson: "What would be the effect of having nearly twice the amount of phosphorus in one arm of the panel raiser head as against another arm; I am talking about the particular panel raiser head you manufactured?"

Mr. Callaway: "I couldn't say whether it would make any difference, being out of cast steel."

Mr. Olson: "No difference, whether the phosphorus content in one arm is twice that in the other?"

Mr. Callaway: "As far as operation is concerned, no; on the operation, none."

Mr. Olson: "If the phosphorus were double in one arm [368] than in the other?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "It would not have any bearing."

Mr. Olson: "Wouldn't it make the steel more brittle, with either of those elements increased?"

Mr. Callaway: "That head is designed for ordinary usage; if it were for extraordinary use, or abuse, it might not stand up."

Mr. Olson: "Then, an extraordinary amount of either sulphur or phosphorus would constitute a defect in iron or steel?"

Mr. Callaway: "I don't think so."

Mr. Olson: "Is your answer no?"

Mr. Callaway: "My answer is no, using it as it is supposed to be used."

Mr. Olson: "What method of heat treatment was used in respect to this particular casting, was the casting quenched in water, or in oil, or was it allowed to cool in the air?"

Mr. Lopardo: "How would he know that?"

Mr. Olson: "I don't know."

Mr. Callaway: "That question would not apply to this head; there is no heat treatment on the head."

Mr. Olson: "On the casting?"

Mr. Callaway: "I don't know about the casting."

Mr. Olson: "You don't know which method was used?"

Mr. Callaway: "I couldn't say; I don't know."

Mr. Lopardo: "He doesn't know whether either method was used."

(Deposition of Charles E. Meissner.)

Mr. Callaway: "I am no foundry man."

Mr. Olson: "What is the effect of the addition of silicon to steel, do you know?"

Mr. Callaway: "I don't know."

Mr. Olson: "Doesn't it tend to make steel brittle?"

Mr. Callaway: "I don't know."

Mr. Olson: "And if too much silicon or phosphorus or sulphur is added, won't it make the steel brittle to the point where it will snap and break very easily?"

Mr. Callaway: "No, I don't say it would break or snap in ordinary usage."

Mr. Olson: "But the question is, wouldn't the addition of any of those three elements make the steel brittle, so that it would snap more easily than it should?"

Mr. Callaway: "No, not in this particular head, using it as it is supposed to be used."

Mr. Olson: "But it would decrease the strength of steel, wouldn't it, if any of those were used in excess?"

Mr. Callaway: "Not where it would make any difference in this head."

Mr. Olson: "It wouldn't make any difference, no matter how much sulphur or phosphorus or silicon was added?"

"Would the addition of any one in excess make any difference?" [370]

Mr. Callaway: "They can go to one extreme or another; but the normal amount in this casting, it

(Deposition of Charles E. Meissner.)

would not make any difference, a few points one way or the other, in this head."

Mr. Olson: "But suppose it were found to be double?"

Mr. Callaway: "That wouldn't make any difference."

Mr. Olson: "Now, let me make this clear, so I am sure you don't misunderstand me: If it were double the normal content, for any one of the three elements, sulphur, phosphorus or magnesium, that wouldn't make any difference?"

Mr. Callaway: "That wouldn't make any difference in this particular head, using it as it was supposed to be used."

Mr. Olson: "But it would tend to make the head more brittle?"

Mr. Callaway: "Not to the point where it would make any difference."

Mr. Olson: "But still, it would tend to make the head more brittle?"

Mr. Callaway: "Not where it would make any difference."

The Court: He is asking the same question and he gets the same answer. They have educated each other.

Mr. Olson: This is page 146, your Honor.

"Now, your company did all the machining on this particular panel raiser head; is that correct?"

Mr. Callaway: "That is right."

Mr. Olson: "It was not sent out to be done?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "No, we did it all."

Mr. Olson: "As a matter of fact, isn't it a common occurrence in machining this type of casting to find blow-holes occasionally?"

Mr. Callaway: "No, it is not, in that type of casting."

Mr. Olson: "What is done with this type of casting if a blow-hole was discovered?"

Mr. Callaway: "If it was discovered, the men have orders to discard it; but I have never discovered any yet in this lot, these heads."

Mr. Olson: "Are blow-holes easily discovered in steel such as this?"

Mr. Callaway: "I would say you could see them, if they were there."

Mr. Olson: "That is, they would be visible on inspection to the naked eye?"

Mr. Callaway: "If they were there."

Mr. Olson: "Without a microscope?"

Mr. Callaway: "That is right."

Mr. Olson: "You wouldn't even need glasses, if you had ordinary eyesight?"

Mr. Callaway: "That is right."

Mr. Olson: "After assembling the panel head; that is, after [372] placing the knives on the casting, and the one part, No. 2, over No. 1, what, if any, tests are made on the whole assembly unit, before it is sent out to be sold, any?"

Mr. Callaway: "They are inspected and balanced by me."

(Deposition of Charles E. Meissner.)

Mr. Olson: "They are not actually run in operation, however?"

Mr. Callaway: "They are not run in operation."

Mr. Olson: "And this particular panel raiser head was not run in operation?"

Mr. Callaway: "That was not tried out in our shop."

Mr. Olson: "And no test was made, in the nature of an operating test; is that right?"

Mr. Lopardo: I would like to object to that on the ground it has been asked and answered twice.

Mr. Olson: This question has never been asked in this whole record.

The Court: Go ahead.

Mr. Callaway: "Like it would be used by this customer in California?"

Mr. Olson: "That's right; like it would be used by anybody, using it for normal purposes."

Mr. Callaway: "No, there was no test made."

Mr. Olson: "You understand the question?"

Mr. Callaway: "You want to know if it was tried out on a wood panel on the shaper in our shop?—No, no tests were [373] made like that."

Mr. Olson: "Like a customer would use it?"

Mr. Callaway: "No, no test was made like that."

Mr. Olson: "And you understand the question?"

Mr. Callaway: "That is right."

Mr. Olson: Let me add something here.

Mr. Callaway: You had better read the part you are going to add to.

(Deposition of Charles E. Meissner.)

Mr. Olson: "If there are a number of small blow-holes in any steel casting of the type we have mentioned here, it will weaken the strength of the steel; is that not a fact?"

"Let me add something to that: "As contrasted to anyother casting of the same type, size, shape, and all have the same components, in which there are no blow-holes; that is, as between the casting with blow-holes and the casting without blow-holes, the one with blow-holes is the weaker; is that true?"

Mr. Callaway: "That is true; but when you are talking about blow-holes I would like to talk about blow-holes in this head."

Mr. Olson: "We are not concerned with blow-holes in this head."

Mr. Callaway: "It is bound to be weaker."

Mr. Olson: The bottom of page 150, Mr. Callaway.

"Among the various causes that you mentioned, which could [374] cause breakage of a head of this kind, or of the particular head in question here,—you didn't use those terms; but striking a hard object in the wood would do it, wouldn't it,—strike a knot, striking a nail?"

Mr. Callaway: "On a piece of steel like this, working on a knot, no; a nail or a heavy iron object in it might."

Mr. Olson: "All right; an improper operation of the—what is the name of that machine, spindle, shaper?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Shaper; spindle is a rod where the head would slip over."

Mr. Olson: "Just a minute, I can look it up; I want to know what the machine was that this thing was mounted on?"

Mr. Callaway: "A tenoner or shaper."

Mr. Olson: "Wasn't this mounted on a double spindle shaper?"

Mr. Callaway: I don't find that.

Mr. Olson: Page 151, line 8. The answer is at line 10.

Mr. Callaway: "A double spindle shaper, or tenoner, or single spindle shaper; either one of the three."

Mr. Olson: "If the particular head in question were mounted on a double spindle shaper, and it was not operated properly, that could cause the head to break?"

Mr. Callaway: "It could."

Mr. Olson: "And defective steel could cause the head to [375] break, couldn't it?"

Mr. Callaway: "No, it could not."

Mr. Olson: "Defective steel could never cause the head to break?"

Mr. Callaway: "Not a head designed the way this is, cutting a light cut out of wood, it could not."

Mr. Olson: "I said just that one fact, if the steel were defective; I am not asking you to admit it was defective, but if the steel were defective, that could cause it to break, couldn't it?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "No."

Mr. Olson: "It could never break because of defective steel?"

Mr. Callaway: "No."

Mr. Olson: "Now, if you knew that there was a blow-hole in the arm which broke in this case would that make any difference in your answer?"

Mr. Callaway: "That wouldn't make any difference."

Mr. Olson: "If you knew there was a blow-hole right straight through the point where it broke?"

Mr. Callaway: "That wouldn't make any difference."

Mr. Olson: "Will you tell us, please, whether an excess of magnesium, phosphorus, or sulphur, could cause the head to break?"

Mr. Callaway: "No." [376]

Mr. Olson: "Now, do you know the operating revolutions per minute, what would be normal for the use of this head?"

Mr. Callaway: "What would be normal safety rpm would be about——"

Mr. Olson: "By rpm you mean revolutions per minute?"

Mr. Callaway: "Yes; say from 3200 to 7200 would be safe normal operating speed."

Mr. Olson: "And you might possibly even go to 10,000 on soft pine lumber, is that right,—safely?"

Mr. Callaway: "Oh, yes; there is a safety margin that it would sustain beyond that 7200, yes."

(Deposition of Charles E. Meissner.)

Mr. Olson: "Up to 10,000 rpm?"

Mr. Callaway: "You could operate it; I cannot say you could operate it as safely as on 7200."

Mr. Olson: "But without nails, knots, or gravel, you could operate up to 7200?"

Mr. Callaway: "You could operate; but I would not say operate it safely."

Mr. Olson: "What would be the safe limits?"

Mr. Callaway: "7200, top limit."

Mr. Olson: "That is the maximum?"

Mr. Callaway: "That is the approximate recommended maximum speed; different shapers run different speed."

Mr. Olson: "The recommended speed of 7200, wasn't it; where was the maximum of safety?" [377]

Mr. Callaway: "There is a margin of safety *was* beyond that."

Mr. Olson: "Yes, up to 10,000 rpm?"

Mr. Callaway: "Yes, easily; but your safety is decreasing when you go up that high."

Mr. Olson: "But still, in soft pine lumber, without knots or other obstructions in the line, up to 10,000 rpm would be safe for normal operating, if the machine is in proper adjustment, and all that; is that right?"

Mr. Callaway: "Soft pine would not have anything to do with it; it is such a shear cutting there it would cut hard or soft."

Mr. Olson: "3200 to 7200 is the normal recommended range, is that right?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "About that, yes."

Mr. Olson: "Give me a figure,—a thousand over, five hundred over?"

Mr. Callaway: "You could probably run beyond 20,000; I am not saying it would be safe."

Mr. Olson: "I am talking about to operating maximum."

Mr. Callaway: "I am saying 7200, maybe 7500 will be safe; I am not saying anything over will be safe."

Mr. Olson: "Now, in making these heads, you do know, do you not, that if the casting is defective that might constitute a danger to the workman operating the head?" [378]

Mr. Callaway: "No, there is no danger."

Mr. Olson: "Even if the head is defective?"

Mr. Callaway: "What do you mean by defective?"

Mr. Olson: "Well, let us assume that the head has a crack through it, a blow-hole through it, half-way through the arm, would that be dangerous to operate?"

Mr. Callaway: "That would not be dangerous under normal usage, no."

Mr. Olson: "It would not?"

Mr. Callaway: "It would not."

Mr. Olson: "You are sure of that, are you?"

Mr. Callaway: "I am sure of that, under normal usage."

Mr. Olson: "Positive?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Positive; because that cut is so light."

Mr. Olson: "All right; suppose it hit an unseen knot in the wood?"

Mr. Callaway: "A knot would make no difference."

Mr. Olson: I just lost you here.

Mr. Callaway: Page 156.

Mr. Olson: You are on page 156?

Mr. Callaway: Yes. That is where the question was answered.

Mr. Olson: "Knots are encountered occasionally in woodworking?"

Mr. Callaway: "Oh, yes."

Mr. Olson: "And sometimes even nails or gravel?" [379]

Mr. Callaway: "That is possible."

Mr. Olson: "Would nails or gravel halfway through it?"

Mr. Callaway: "I couldn't answer a question like that; I wouldn't know what size nail."

Mr. Olson: "Would size of the nail make any difference?"

Mr. Callaway: "Say, for instance, they had a big spike in there, on the end of a two by four."

Mr. Olson: "That would be dangerous?"

Mr. Callaway: "That would be dangerous."

Mr. Olson: "In case the head strikes a big spike, or some other obstruction, it could disintegrate and blow all to pieces; couldn't that happen?"

(Deposition of Charles E. Meissner.)

Mr. Callaway: "It is not designed for metal cutting."

Mr. Olson: "But that could happen, couldn't it?"

"Do you know whether that could happen?"

Mr. Callaway: "I never heard of an instance where you ran into a spike."

Mr. Olson: "Please answer the question: If it would hit a spike, with the defective head I have described,——"

Mr. Callaway: "I couldn't answer that; I don't know, that is hard to say."

Mr. Olson: You are one ahead of me.

"Please answer the question: If it would hit a spike, with the defective head I have described,——"

Mr. Callaway: "I couldn't answer that; I don't know, [380] that is hard to say."

Mr. Olson: Now they are just squabbling.. Let's go to page 158, Mr. Callaway.

"Assuming that the arm down here at the base, between where the arm joins onto the rest of the casting,—assume there were a blow-hole in there, and assume that that was maybe one-quarter inch long, and varied in width from, oh, two or three thousandths, up to maybe .040 or .050 of an inch, and so extended through the width for perhaps .010 or .015 of an inch, would that constitute a dangerous condition in the head, under normal usage?"

Mr. Callaway: "Assume he hits a spike?"

(Deposition of Charles E. Meissner.)

Mr. Olson: "No, under normal usage; forget all about spikes."

Mr. Callaway: "No, under normal usage that would not be a dangerous condition to operate that head."

Mr. Olson: "You are sure of that?"

Mr. Callaway: "I am sure of that."

Mr. Olson: "And assume it hit a spike or a knot or a nail, would it then constitute a dangerous condition?"

Mr. Callaway: "A knot, no; spikes, I couldn't answer. I don't know how that spike is aranged in that wood; I don't know how the operator is speed the lumber, or how fast; I couldn't answer."

It is quarter to five, Mr. Olson. [381]

The Court: Do not look at the clock. I am going to finish.

Mr. Callaway: That is the reason I mentioned it.

Mr. Olson: Are we going to finish it all tonight, your Honor?

The Court: All the testimony will be finished tonight.

Mr. Olson: I am trying to eliminate as much——

The Court: I am not rushing you.

Mr. Olson: I will have to put this in.

Page 159, Mr. Callaway.

"Yes; now I am going to ask you to assume the following facts,—now, please bear in mind that this has nothing to do with your particular case, it is not your particular head, although it may sound

(Deposition of Charles E. Meissner.)

that way; but if you will listen carefully, these are all assumed facts, simply for the purpose of the question; assume the following facts: That on or about October 28, 1948, in or near Los Angeles, California, a workman is using a new Champion panel raiser head with a 1-1/4 inch bore, right hand, designed and manufactured by your company for cutting lumber; that this panel raiser head has an upper and lower cutter, which has been properly installed upon a double spindle shaper; this panel raiser head has had less than three hours use; it is operated up to that time without any difficulty, and in perfect, normal and proper fashion; the workman or operator [382] is using this panel raiser head upon new soft pine lumber containing no gravel, nails, or other hard objects; he is cutting the lumber, or shaping it to make a door; he is using ordinary and reasonable care for his own safety in such operation; now, if that panel raiser head had been manufactured with ordinary and reasonable care, inspected with ordinary and reasonable care, installed with ordinary and reasonable care, upon a double spindle shaper, and if the installation had been inspected and found proper, and if it had operated and been found proper for over two hours prior to the time in question, and if at the time in question it was being operated with ordinary and reasonable care and without striking any hard object, such as a nail, stone, or other hard objection in the wood, no breakage of or damage to the raiser head would result, would it?'

(Deposition of Charles E. Meissner.)

Mr. Callaway: "Under normal usage, no."

Mr. Olson: Page 161.

"Now a further question: Under those circumstances which I have detailed, the panel raiser head would not break and disintegrate, would it?"

Mr. Callaway: "Under normal usage, no."

Mr. Olson: The answer is "No." At the bottom of page 161.

Mr. Callaway: That is where I am reading.

Mr. Olson: You said, "Under normal usage, no." [383]

Mr. Callaway: All right. "No."

Mr. Olson: "And the circumstances I have described are what you would term normal operation, are they not?"

Mr. Callaway: "If everything is right, and we know it to be right, and I should know it,——"

Mr. Olson: "I am talking about the elements that I detailed; they are all what you would include in normal operation; if not, tell me."

Mr. Lopardo: "Do you remember all the elements to that question?"

Mr. Olson: They are quibbling now. Page 163, at the top, Mr. Callaway.

Mr. Callaway: "I would say yes."

Mr. Olson: "And under that kind of operation, under those circumstances, the head would not break, in normal usage?"

Mr. Callaway: "In normal use, no."

(Deposition of Charles E. Meissner.)

9:11; that is all right."

This deposition commenced at 10:00 o'clock in the morning.

The Court: That serves him right, to have talked so much. [386]

Mr. Olson: We are nearly through.

"Now, at the time your company manufactured the particular head in issue here, you knew that it would be operated by a workman; isn't that right?"

Mr. Callaway: "Oh, yes."

Mr. Olson: "And you also knew at that time that unless it was structurally sound that it might break and injure somebody; is that true, unless it was structurally sound—that it might break and injure somebody?"

Mr. Callaway: "It was structurally sound."

Mr. Olson: "Answer my question: You knew at the time you made it that if it were not structurally sound it might break and injure somebody?"

Mr. Callaway: "What do you mean, not structurally sound?"

Mr. Olson: "What do you mean by structurally sound?"

Mr. Callaway: "Structurally sound is the way we make them, design it."

Mr. Olson: "Then you knew unless the head was structurally sound it might break and injure

(Deposition of Charles E. Meissner.)

somebody; you know that is the case of every tool you make?"

Mr. Callaway: "They are structurally sound; they are inspected."

Mr. Olson: "Let us forget this particular head, for the moment: You and I don't see eye to eye, because you think I am trying to do one thing, when I am trying to do another. [387]"

"In the case of any tool that your company makes, if it is not structurally sound, if it is not properly made, it may be unsafe for the person who uses it—you know that, don't you?"

Mr. Callaway: "If it is not structurally sound, yes."

Mr. Olson: "And if this particular head had turned out not to be structurally sound, it might injure somebody; isn't that true?"

Mr. Callaway: "No, not the way it is designed."

Mr. Olson: "Assume for the moment it is structurally unsound, it is possible that, being structurally unsound, it could harm somebody; isn't that right?"

"At the time you made this particular head you knew if it were not structurally sound it would be unsafe?"

Mr. Callaway: "If I could see it—it was not unsound."

Mr. Olson: "Forget this particular head; any head that your company ever made, if it was not

(Deposition of Charles E. Meissner.)

structurally sound, might become unsafe to the user?"

Mr. Callaway: "If it was structurally unsound, that we could see it, it would never pass our inspection."

Mr. Olson: "But if it had been structurally unsound, and it had got by through some accident, it would be unsafe, wouldn't it?"

Mr. Callaway: "No, it would not be unsafe, the way that is constructed." [388]

Mr. Olson: "You mean it would be unsafe if it were improperly constructed?"

Mr. Callaway: "It was properly constructed."

Mr. Olson: "I am not talking about this particular head; any head, if the steel had blow-holes in it, it might become unsafe to the user; isn't that true?"

Mr. Callaway: "No."

Mr. Olson: "Why do you inspect it for blow-holes, because it might be unsafe with blow-holes?"

Mr. Callaway: "We just take those precautions; when a man is turning——"

Mr. Olson: "And you would throw a head out that had blow-holes?"

Mr. Callaway: "I have never thrown one out; but I would, yes, if I could see it."

Mr. Olson: "And the reason is because it would be structurally unsafe, isn't that right?"

Mr. Callaway: "Yes, it would be unsafe."

Instead of reading all that quibbling back and

(Deposition of Charles E. Meissner.)

forth, if you would get to the meat of the coconut——

Mr. Olson: I am trying to, but there is some of this I want the jury to hear. The bottom of page 170, Mr. Callaway.

“Would the presence of the conditions I have indicated; that is, first, a blow-hole or gas pocket in the base of the arm; secondly, a high phosphorus and silicon content—would [389] those indicate improper heating of the casting?”

Mr. Callaway: “That I couldn’t say.”

Mr. Olson: “Would they indicate improper cooling of the casting?”

Mr. Callaway: “I couldn’t say.”

Mr. Olson: “Or treating of the casting in any way?”

Mr. Callaway: “I don’t know.”

Mr. Olson: “Or manufacture of the casting?”

Mr. Callaway: “I don’t know.”

Mr. Olson: “As a matter of fact, the conditions that I have just described; that is, the break, the blow-hole or gas pocket in the arm at the base of the arm, and the high phosphorus and silicon content, which is double in that arm at that point what it was in the other arm, constitutes a dangerous condition in the casting, do they not?”

Mr. Callaway: “I would not say it constituted a dangerous condition in this casting.”

Mr. Olson: Page 173, top of the page.

“Now, an excess of silicon or sulphur or phos-

(Deposition of Charles E. Meissner.)

phorus in the casting could not be determined by everybody, by ordinary workmen in using the head, could it?"

Mr. Callaway: Is that page 173?

Mr. Olson: Yes. Line 7.

Mr. Callaway: "An average fellow working in a mill, running panel raiser heads, in our head he would not know if [390] it was, or not."

Mr. Olson: "He would not know whether it was sound or whether it was dangerous?"

Mr. Lopardo: I object to that on the ground it calls for speculation.

Mr. Olson: The witness answered the question.

The Court: Overruled.

Mr. Callaway: "He wouldn't know."

Mr. Olson: "And he wouldn't know whether there were blow-holes in it or not, would he; I mean if they were inside the metal?"

Mr. Callaway: "If they were inside, underneath the surface, he couldn't tell."

Mr. Olson: "If they were inside and underneath the surface, that could have been determined by either the foundry or by the manufacturer, if it was not the same as the foundry, by making X-ray or other tests?"

Mr. Callaway: "I couldn't say."

Mr. Olson: "You mean you cannot tell here whether blow-holes can be ascertained or found by X-ray?"

Mr. Callaway: "They could be found by X-rays, yes."

(Deposition of Charles E. Meissner.)

Mr. Olson: "These castings are never tested by X-ray at the foundry?"

Mr. Callaway: "I wouldn't know."

Mr. Olson: "You just said it was not necessary." [391]

Mr. Callaway: "It is not necessary."

Mr. Olson: "But you don't know whether they are actually made, or not?"

Mr. Callaway: "X-rays made at the foundry?"

Mr. Olson: "Yes."

Mr. Callaway: "I couldn't say."

Mr. Olson: "But blow-holes would be revealed by proper tests and inspection; is that right?"

Mr. Lopardo: That is objected to.

Mr. Olson: The question is rephrased.

"By tests, then you tell me what proper tests are; I don't know. You know they would be revealed by tests."

Mr. Callaway: "If they are turning, and they are underneath the surface, yes, you could see them."

Mr. Olson: "And you could ascertain whether blow-holes are in the metal, by proper tests?"

Mr. Callaway: That question wasn't answered.

Mr. Olson: "By tests ordinarily used on such castings they could be located; you know that, don't you?"

Mr. Callaway: "By certain tests, yes."

Mr. Olson: "By certain tests; is that right?"

Mr. Callaway: "Ask me what tests?"

(Deposition of Charles E. Meissner.)

Mr. Olson: "Use your own tests."

Mr. Callaway: "Underneath the surface, that you cannot detect with the naked eye." [392]

Mr. Olson: "No, but by other tests, there are tests?"

Mr. Callaway: "Yes."

Mr. Olson: "And there are tests for indicating blow-holes under the surface, as well as those that extend through the surface; isn't that right?"

Mr. Callaway: "Yes."

Mr. Olson, the witness has answered by saying you can tell them by X-ray.

Mr. Olson: You can tell it by X-rays?

Mr. Callaway: Yes. You just got through reading about ten questions back about that.

Mr. Olson: Mr. Johnston on page 177 says: "You are getting tired, and getting crabby." I can understand what he meant.

The Court: They indicate it. We are all human.

Mr. Olson: Page 178.

"Do you know whether anybody made any tests for hidden blow-holes?"

"Answer the question: Do you know whether anybody made any tests? All you have to do is say yes or no."

Mr. Callaway: "Yes."

Mr. Olson: "Who made such tests?"

Mr. Callaway: "We made those checks."

Mr. Olson: "By we, you mean your company?"

Mr. Callaway: "We check it for hours in the operation."

(Deposition of Charles E. Meissner.)

Mr. Olson: "For hidden blow-holes?" [393]

Mr. Callaway: "That is right, in the machining itself."

Mr. Olson: "But the machining would not show hidden blow-holes, under the surface?"

Mr. Callaway: "That you couldn't see."

Mr. Olson: "So you didn't make any test for hidden blow-holes?"

Mr. Callaway: "That is not necessary."

Mr. Olson: "Answer my question."

Mr. Lopardo: He has answered.

Mr. Olson: "Did you make any tests for hidden blow-holes?"

Mr. Callaway: "I said yes."

Mr. Olson: "What was that test?"

Mr. Callaway: Well——

Mr. Olson: Go ahead, please.

Mr. Callaway: "While it was being machined."

Mr. Olson: "All right, what was the test?"

Mr. Callaway: "Well, when a man is machining he can tell if he runs through a blow-hole, or not."

Mr. Olson: "I am talking about hidden blow-holes, under the surface."

Mr. Callaway: "When you are machining you are running underneath the surface."

Mr. Olson: "Were there any tests made for blow-holes beneath the surface of the machining?"

Mr. Callaway: "Not beneath the surface of the machining." [394]

(Deposition of Charles E. Meissner.)

Mr. Olson: The bottom of page 180.

“The machinist, mechanic, or whatever you call him he made a test by visual inspection, with the eyes, for blow-holes that came through the surface?”

Mr. Callaway: “While he was machining that, yes.”

Mr. Olson: “That is the only test he made?”

Mr. Callaway: “Yes; you said test beneath the surface; that is beneath the surface.”

Mr. Olson: The top of page 182.

“It would not weaken it”—oh, that is an answer. Excuse me.

“No matter how large it was?”

Mr. Callaway: “No matter how large, the way that is constructed.”

Mr. Olson: I think that is all.

Mr. Lopardo: Do you want to do anything on redirect examination?

Mr. Callaway: No. With that, if the court please, we will rest.

The Court: The clerk will mark the depositions and file them as a defendant's exhibit.

The Clerk: Defendant's Exhibit G, in evidence.

(The document referred to was marked Defendant's Exhibit G, and was received in evidence.)

The Court: Is there any rebuttal? [395]

Mr. Olson: No rebuttal.

The Court: Ladies and gentlemen of the jury, you will be excused until Monday morning. I have changed my mind about tomorrow. So long as the arguments cannot be concluded this afternoon we will adjourn to Monday. I can see no reason why we cannot observe the usual recess to Monday, at least.

Ordinarily we do not try cases on Monday. Monday is reserved for motions. In view of the fact that I have just come from the criminal department, during which time no civil cases were sent to me, I have not accumulated many, so I can try cases on Monday, too, as well as hearing the motions.

Counsel have some matters to discuss with me regarding the instructions after you have gone this evening. So far as you are concerned, we will adjourn until 9:00 o'clock Monday morning, if that is convenient. Will that be inconvenient to anyone that lives at a distance?

A Juror: Yes. I have to get up at 6:00 o'clock to get here at a quarter of ten. I live in Long Beach.

A Juror: I have to get up at 6:00 to get in here from Burbank. The bus service is very bad.

The Court: I am trying not to make it too difficult. We set just so many cases and they have to be tried. Otherwise the man whose case is set for next week cannot have his [396] trial promptly. In order to try the cases promptly we have to have everybody's co-operation, to get the cases out of the way.

or connection between the defect, if any, of the device and the injuries received by the plaintiff.

Mr. Olson: May I reply to that?

Mr. Callaway: That is all.

Mr. Olson: Do you want me to reply to that?

The Court: Yes.

Mr. Olson: In opposition to defendant's motion for a directed verdict, his first ground is no negligence has been shown by the plaintiff, and I submit that negligence is shown both by the testimony of the witnesses for the plaintiff and by the defendant's own testimony, as borne out in the depositions.

Further, even for the purpose of argument, granting that no negligence, actual negligence is shown under the doctrine or *res ipsa loquitur*, the matter must go to the jury on that question of negligence.

So far as the ground of no causal connection is concerned, between the defect and the injury, "causal connection" is, in [399] my opinion, the wrong words. He means proximate cause, I assume. In other words, it was a defect that was the proximate cause of the injury. I believe that is, without a doubt, established. For that reason I oppose the motion.

The Court: I am not so sure, gentlemen, that the evidence presented by the defendant in this case does not come within one of the cases cited, where the Court of Appeals, District Court of Appeals, heard that upon a showing of inspection and precaution which conformed to the ordinary inspection, that the burden has been met.

The difficulty of the problem lies, however, in the fact that while so holding in the particular case, they have said that ultimately, whether the evidence offered on the part of the defendant shows the taking of ordinary precaution is a question of fact, and where there is a jury it is a question of fact for the jury.

Fortunately, under our procedure, there is a method that can be provided. There is a method which can be pursued, and which I have pursued in several cases, which leaves open for determination later on, after a verdict, of any questions that may arise from the insufficiency of the evidence.

While I have kept in touch with the doctrine of *res ipsa loquitur*, I may say that this is the first case since I left the Superior Court that I had with a jury involving the application of this doctrine. In your study of the cases, you [400] probably ran across some of my cases that went to the Court of Appeals. One of them is the famous case, the one against the Southern California Gas Company, the gas riser case.

Mr. Olson: Chester?

The Court: The Chester case. I divided the courts in that case. The Court of Appeals ruled one way and then the case went to the Supreme Court, and I had everybody in the State of California, including my best friends, appearing as *amici curiae* against me, including my old friend, Hiram Johnson, who is probably as much responsible for my being a judge in the State of California as anyone.

I am pointing to that to show that the problem is a very difficult one. In that case the court said that my own reactions to the facts did not satisfy them. I thought the company had taken sufficient precaution by examining those risers. It had not been shown what broke them, and the presumption would be because the explosion happened after a man drove an automobile over the lot that probably he did it.

To give ourselves an opportunity to discuss the matter more fully, if necessary, I shall follow the procedure which, as you know, harms no one, and that is in the procedure prescribed by subdivision B of Rule 50. Regardless of what the jury verdict is, I shall reserve ruling on the motion until after the verdict. At that time we will determine the motion and counsel will have further opportunity to discuss [401] the matter in the light of the verdict.

I may say that this method has great advantage. I used it in the Northern District of California a year ago last July when I sat there, where I granted the motion after the verdict of the jury, contrary, of course, to the verdict.

I placed the case in this position: that if the Court of Appeals agreed with me, then there would be no new trial. If they did not agree with me, all they had to do was restore the verdict. That particular case was an insurance case. That was the Bolter case. You probably remember it.

Mr. Callaway: Yes.

The Court: It involved an insurance company. It involved the interpretation of a use clause in a truck liability situation, being limited to the time when a truck is used in hauling goods for profit only. The court did not agree with me. They held that there was evidence from which the jury could infer the man was not on a vacation trip, but was engaged in something incidental to his business. They merely restored the verdict of the jury.

I am merely making this statement in case you may not be familiar with all the implications of this ruling, and so that you will not be worried about it. It does not do anyone any harm. It keeps matters as they are, until we hear from the jury, and then whatever I do is done in such a manner that ultimately the opportunity is given for a higher court [402] to deal with the case on the basis of the verdict of the jury. I believe in this case, because of the nature of the case and the nature of the testimony, it is better to handle it in this manner. The ruling will be reserved.

Gentlemen, under the rules of Federal Procedure I am required to inform you before the arguments of my actions on your instructions. The object is to give you a little more freedom in arguing to the jury and, as you know, after the instructions have been read the court will ask whether you have any objections. If you have any objections, they can be heard in the absence of the jury.

I am making this statement because some judges,

like Judge Harrison, combine the two in one. I do not do that. For one thing, I change my mind so rapidly that when I read instructions I sometimes may remove one that I told you I was going to give. Unless I gave you another chance you never would have an opportunity to make your objections. That is one place in the Federal Procedure where you cannot urge error unless you have objected.

You have saved me a lot of labor by confining your instructions to merely your theory of the case. That is all I ask of counsel, because the general instructions I prepare myself and I give them in all cases. Many of them have stood the test four or five times before the higher courts.

There is one thing I want to remind you of, and that is to [403] please number the instructions. If you number them with pencil it will be all right. It helps me to indicate to you what I have done to the instructions.

We will take the plaintiff's instructions in order. No. 1 is an instructed verdict, which I shall not give.

No. 2 I am inclined to give, Mr. Callaway, because I do not think there is any evidence from which contributory negligence can be inferred, although you did not request this instruction, I will give an instruction about defining an unavoidable accident.

I am frank to say I cannot see what evidence there is in the record from which any contributory negligence can be inferred. If you can point out to me anything from which you could argue it, I will be glad to listen to it.

Mr. Callaway: I will make this one observation. The plaintiff's own testimony is he heard a clicking and ducked down under the table before there were any parts that fell. Actually, we weren't there and couldn't prove that.

If the court does not feel that has any bearing on the matter, all right. That is the only observation I would like to make.

The Court: That is an argument that can be made to the jury, as to whether his injury was really caused by any defect. But that does not show that he failed to do anything that he should have done. It is the ordinary reaction of a [404] person who hears an unusual noise and is afraid of things falling, and he would duck. And that is what he did.

Mr. Callaway: I am not saying the ducking is contributory negligence.

The Court: What is it, then?

Mr. Callaway: To leave the machine and his wood free there and go off his guard suddenly might be said to have been negligence, in view of the fact that there has been no explanation of what caused this to break. That is my only comment.

The Court: I will make a note of that and think of it.

Mr. Olson: May I say something in that connection?

The Court: Yes.

Mr. Olson: Leaving the machine a man is working with, a dangerous instrumentality, and he hears

an unusual sound, he would actually be negligent if he didn't leave the machine as fast as possible.

I would venture to say if Mr. Byrne had stood there and that piece had gone through him and not ducked they would have said it was negligence on his part. The fact he did duck, they say, is negligence. I think the argument is double-headed.

The Court: Wait a minute. The question before me is not a question of fact. The question is whether I should instruct the jury, as a matter of law, there is no contributory negligence. [406]

Mr. Olson: There isn't any.

The Court: That is the point.

Mr. Olson: There is no evidence——

The Court: If there is any from which an inference can be drawn, then I will give the jury a definition of contributory negligence. As you know, I have reviewed very recently for an opinion I am working on for the Circuit Court of Appeals, I have had on review practically all the late cases, down to 84 Cal. App. (2d), dealing with the problem.

The California courts have been so liberal in holding that the question of negligence, contributory negligence is a case for the jury unless, they say, it can be said that under no possible approach or view of the evidence could a jury infer that there was negligence. I will give the matter some thought. If I change my mind, you will find it out. But at the present time I am inclined to think that that instruction will not be given.

Mr. Callaway: I am going to have to leave Mr. Lopardo here and he will make notations of what instructions you give and what instructions you do not. He knows my views.

The Court: It will take me not more than five minutes. I will go through the entire instructions in five minutes.

The next number, which I will call 4, is merely a definition of proximate cause. I will give a definition of [406] proximate cause of my own.

I am giving a definition of negligence, what negligence is. Even the law of *res ipsa loquitur* is grounded on negligence. I will give a definition of what negligence is.

Mr. Olson: I assume you would.

The Court: I will define proximate cause. The next three I will give. The last one I will modify by inserting the language——

Mr. Olson: The one that starts out, “There is in our law a doctrine applying——”

The Court: Yes. I will modify it by putting in the clause from the O’Rourke case you eliminated, which says, “However, the manufacturer is not responsible for defects that cannot be found by a reasonable, practicable inspection.” Those are the identical words of the case.

Mr. Olson: No objection.

The Court: The next one beginning, “From the happening of the accident,” will be given as modified, and the modification occurs after the word “evidence,” by putting in the following: “Unless

overcome by contrary evidence or inferences from such evidence."

Mr. Olson: "As established by the evidence," you mean to put it in right after that?

The Court: "Unless overcome by contrary evidence or inferences from such evidence." The inferences the jury can [407] draw from such evidence. They are entitled to do so, not only contrary to the evidence, but to the inferences that can be drawn from contrary evidence.

The next one I will give, except that I will put in a clause. I will not stop to give you the wording of it. I will add to it so as to tie this to the defense, also. I will put in a clause to the effect that the accident was not due to the fault of the installation or operation over which the defendant had no control.

Mr. Olson: Oh, yes.

The Court: That is all. I will substitute my own instructions on damages and general damages.

Here is a problem that arises in this case: In your complaint, under your prayer for special damages, you only include your medical expenses. You do not include the loss of wages.

Mr. Olson: That is due to the fact I have a new secretary. May I ask the court to put that in?

The Court: The Hildebrand firm does not separate them. I have tried to cure them of that habit. I have not succeeded as yet. That is the custom they use in the northern part of the state, they include both general and special damages.

Mr. Callaway: On the medical aspect, there is no evidence this man said he was entitled to between \$350.00 and \$400.00 [408] for medical. No witness expressed the opinion that was the reasonable value of any services rendered to him. He presented no medical bills in this case. I don't see how——

Mr. Olson: No contrary evidence he didn't pay that.

The Court: There is liability. I will give a general instruction as to that. There is no evidence of reasonableness, that is true.

Mr. Olson: It speaks for itself. I am just speaking unjudicially. I think it is a very minimum amount.

The Court: I will give a general instruction to the jury explaining the nature of special damages, and then you gentlemen can argue whether there is any proof of reasonableness, and instead of having a maximum which I do not have, because there is not one here, I will merely say "as prayed for in the complaint."

Now, as to yours, Mr. Callaway, yours as a matter of fact, complement the other instructions. I am going to give No. 1, the one on O'Rourke. And your No. 2 and No. 4.

I am not going to give No. 3 because it is based on Gerber, and I don't agree with that phase in Gerber.

Mr. Olson: I agree with you. Thank you.

The Court: I think those dovetail, and if I can catch any repetition I may discard some of them.

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right, nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, [413] satisfied as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given to you by the Judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the court—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with those instructions as you have been sworn to do.

You are the sole judges of the effect and value of the evidence. Your power, however, of judging of this effect and value of the evidence is not arbitrary, but is to be exercised with legal discretion, and insubordination to the rules of evidence. You are not bound to decide in conformity with the

declarations of any number of witnesses which do not produce conviction in your minds, against a lesser number or against a presumption of law or evidence which satisfies your mind. In other words, it is not the greater number of witnesses which should control you where their evidence is not satisfactory to your minds, as against a lesser number whose testimony does not satisfy your minds. [414]

In weighing the evidence, you are to consider the credibility of witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses, their character, as shown by the evidence, their manner on the stand, their relations to the parties, if any, their degree of intelligence, and the reasonableness or unreasonableness of their statements, and the strength or weakness of their recollection may be taken into consideration for the purpose of determining their credibility. A witness is presumed to speak the truth; this presumption, however, may be repelled by the manner in which the witness testifies, by the character of his testimony, or by testimony affecting the character of the witness for truth, honesty, or integrity, or by his motives or by the contradictory evidence.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and being convinced that a witness has stated what is untrue, not as the result of mistake or inadvert-

ence, but wilfully and with a design to deceive, you must treat all of his testimony with distrust and suspicion, and reject it all unless you shall be convinced notwithstanding the base character of the witness, that he has in other particulars sworn to the truth. [415]

The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or comport with some fact or facts otherwise known or established by the evidence. You should not consider as evidence any statement of counsel made during the trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts.

Such statements, arguments, comments or suggestions are not evidence and must not be considered as such by you. You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inference which you may deduce therefrom as stated in these instructions, and upon the law as given you in these instructions.

In a civil case, such as this, the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of evidence. The law does not require a demonstration, that is, such a degree

of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. The burden is upon the plaintiff to prove his case by a preponderance of the evidence.

Preponderance of the evidence means the greater weight [416] of the credible evidence as you find it to be. Or such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider expert opinion. However, you are not bound by such an opinion. You should give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it if in your judgment the reasons given for it are unsound.

By this action plaintiff seeks to recover general damages in the sum of \$30,000 against the defendant and additional medical expenses and loss of wages by reason of injuries alleged to have been suffered by the plaintiff while operating a panel head on October 28, 1948, in the course of his employment by the Selby Company. The plaintiff alleges that the defendant was negligent in the manufacture,

sale and delivery to the plaintiff's employer of a structurally [417] defective panel head, and that such negligence caused his injuries.

The plaintiff was not the employee of the defendant.

The defendant has denied any negligence on its part and liability towards the plaintiff.

Negligence is the omission to do something which a reasonable person guided by those considerations which ordinarily influence a person of reasonable prudence would do under all the circumstances of the situation in question, or the doing of something which a person of ordinarily reasonable prudence would not do under all the circumstances of the situation in question. The question of whether or not there was negligence in a particular instance would be determined by you from all the circumstances and conditions as shown in the evidence at the time surrounding the person to whom the negligence is charged.

Negligence is a comparative and not a positive term. It always relates to some circumstance of time, place or person. It is determined in all cases by reference to the situation and knowledge of the parties and to all the attendant circumstances.

The proximate cause of an event must be understood to be that which, in the natural and continuous sequence, unbroken by any new, independent cause, produces the event and without which that event would not have occurred. [418]

There is in our law a doctrine applying to neg-

ligence cases which is commonly known as the doctrine of “*res ipsa loquitur*.” Literally translated from the Latin, this means, “the thing speaks for itself.”

That doctrine means that if a subject matter is shown by the evidence to have been manufactured and supplied for a particular use, and an injury to some person results from such usage, which would not have occurred in the ordinary course of things, if ordinary and proper care had been used in its manufacture, the thing or subject matter speaks for itself and the law raises the presumption that the manufacturer did not use ordinary and proper care in its production. The burden would then be on the manufacturer to substantially prove that ordinary and proper care was used in the manufacturing and supplying of such subject matter.

However, the manufacturer is not responsible for defects that cannot be found by a reasonable, practicable inspection.

In this case if you find from the evidence that plaintiff was injured by the disintegrating or breaking apart of the appliance in question, described as a “Panel Raiser Head,” while plaintiff was employed by the Selby Company in connection with its use for the purpose for which it was manufactured and supplied and if you further believe from the evidence that this accident and injury would not have occurred if the panel raiser head had been properly manufactured and constructed and ordinary and proper care had been used in its

manufacture, and that the accident was not due to faulty installation or operation over which the defendant had no control, you are instructed that these facts would raise a presumption of negligence on the part of defendant in failing to use ordinary and proper care in the manufacturing and supplying of the panel raiser head. The burden of proof would then be on the defendant to overcome this presumption and free itself from the charge of negligence by substantially proving that it did use ordinary and proper care in that respect.

You are instructed that if the defective condition of the part, if you find that the injury resulted from such defective condition, could have been disclosed by reasonable inspection and tests, and such tests and inspections were omitted, then the defendant has been negligent.

You are further instructed that reasonable care under this instruction consists of making inspections and tests during the course of manufacture, and after the article was completed, which the manufacturer should recognize were reasonably necessary to secure the production of a safe article considering the nature of the article and the purpose for which it was to be used.

When in the manufacture of such an article as the panel raiser head here involved there is used any material or part obtained from a source outside the manufacturing plant in [420] question, it is the duty of the manufacturer to make such inspections and tests of that imported material or

part as ordinary prudence would indicate to be necessary, to the end that the safety of the finished article for the intended or invited use will be reasonably certain. Failure to fulfill that duty is negligence. On the other hand, if the manufacturer performs that duty, and the inspections and tests do not indicate a defective or dangerous condition, and it does not know of such a condition, it is not liable for injury resulting from its use of such material or part, although it later proved to be defective.

The reasonableness of the inspections necessary to determine whether a manufactured article is safe for use varies with the circumstances of each case, and the purpose for which the article is intended must be considered, that is to say, that a manufactured article need not be absolutely safe for all purposes but only for the purpose for which it was manufactured; therefore, if you find that the defendant properly made inspections reasonably designed to find defects which would render the panel raiser head unsafe for cutting and trimming wood, you must find that those inspections were reasonable; and if you find that the said inspections did not reveal any such defects in the panel raiser head, then you must find that the defendant was not negligent in the manufacture of the panel raiser head. [421]

You are instructed that the degree of care necessary to be exercised by a manufacturer in the production of a product varies with the danger to be

expected from the product, and you are further instructed that the kind of inspection called for on the part of the manufacturer varies with the nature and danger of the thing inspected.

Reasonable care is making the inspections and tests during the course of manufacture which the manufacturer should recognize as reasonably necessary to secure the production of a reasonably safe article; therefore, if you find that the defendant properly inspected the casting which it purchased from another manufacturer, and if you find that the defendant properly inspected the completed panel raiser head you must find that defendant exercised reasonable care.

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

If your verdict be for the plaintiff, the measure of his recovery is what is denominated compensatory damages, that is, [422] such sum or sums as will compensate him for the injuries sustained. The elements are the following: Just a moment, gentlemen. Counsel need not look at the instructions. You do not have this one. This is my own.

Incidentally, all the instructions are rewritten on

government paper so there is no indication whatsoever where they came from. I am making that statement because of the statement I made for the jury that I will allow them to receive the instructions.

Jurors, of course, know that counsel submit instructions and the court then passes on them. But the instructions I give you are my instructions, regardless of who suggested them.

Such sum, if any, as will compensate for expenses incurred and to be incurred in medical treatment, if any, and medicine and other expenses and wages lost not exceeding the amounts prayed for in the complaint.

Such sum, if any, as the jury shall award to the plaintiff on account of the pain and suffering and mental anxiety, if any, suffered or which he is certain to suffer in the future, if any, not to exceed the amount claimed by him in his complaint.

The first element of damages is the subject of direct proof and is to be determined by the jury on the evidence before them. It is called "special damages." [423]

The last element, however, the one which is called general damages, is, of necessity, left to the sound discretion of the jury, to be determined from the evidence they have before them, and the law of the case as given them by the court in the instructions.

The law does not require that the plaintiff present any direct evidence to show the amount of general damages which he has sustained by reason of the

personal injuries and suffering sustained by the plaintiff, if any, or the amount of money which would compensate him for such injuries and suffering, if any. All that is necessary in this behalf is to show to the jury the extent of such injuries and suffering, if any, and that they were proximately caused by the accident. Then it is for the jury to determine, in the manner I have indicated, the amount of damages, if any, which ought to be awarded to the plaintiff therefor, if any.

Mental worry, distress, grief and mortification, if any, which a person suffers or is certain to suffer by reason of his physical injuries growing proximately out of an accident, are proper component elements of that mental suffering and anxiety for which the law entitles one injured through the negligence of another proximately causing such injury, to redress, if it appears from the evidence that such mental anxiety is proximately caused from the injuries received in such accident. [424]

You are instructed that special damages as distinguished from general damages are those which are natural but not necessary consequences of a negligent act. They are damages which, as such, were incurred by the particular individual by reason of the particular circumstances. They are such as will compensate plaintiff for the reasonable value, not exceeding cost to plaintiff, of the examinations, attention, care by physicians and surgeons, reasonably required and actually given in the treatment of plaintiff, and reasonably certain to be required

and to be given in his future treatment, and included in such care, X-ray pictures, the reasonable value not exceeding the cost to plaintiff of the services of nurses, attendants, hospital accommodations and ambulance service, if any, and reasonably certain to be required and given in his future treatment, if any, and finally, the special damages are such as will compensate plaintiff for the reasonable value of the time lost, if any, by plaintiff since his injury wherein he has been unable to pursue his occupation, if you find that he were to so engage in his occupation or other occupation. In determining this amount, you should consider such plaintiff's earning capacity, his actual earnings, and the manner in which he ordinarily occupied his time before the injuries, and further consider the evidence as to the probability and possibility of plaintiff pursuing his occupation or any other occupation in the future.

You are instructed that the amount claimed by the plaintiff is not to be considered in any wise by you as a criterion of damages, if any, suffered by plaintiff, nor shall any such claim in his complaint be taken by you as indicating that plaintiff is entitled to any damages whatsoever. Before you may even consider the question of damages, you must first determine from a fair preponderance of all evidence that the defendant was negligent, and that such negligence, if any, was the direct and proximate cause of the injury of which the plaintiff complains.

The fact that I have instructed you upon the

measure of damages is not to be taken by you as an intimation that I believe that the plaintiff is entitled to recover damages.

These instructions are given you solely to aid you and to guide you in finding a verdict in the case in the event you find that the plaintiff is entitled to recover.

If from the evidence and under the instructions as I have given you, you do not believe the plaintiff is entitled to recover, then you are to return a verdict in favor of the defendant, and the instructions given on the subject of damages lose their entire significance and need not be considered at all.

Your first duty upon retiring to the jury room to begin your deliberations in the case will be to select one of you to act as foreman in the case. Foreman means either sex. [426] A forewoman is also a foreman. We use the masculine to cover both.

For your assistance the clerk has prepared two forms of verdict, reading as follows: Title of court and cause.

“We, the Jury in the above-entitled cause, find in favor of the plaintiff, William J. Byrne, and against the defendant, Woodworkers Tool Works, a corporation; and fix the plaintiff’s special damages at, and fix plaintiff’s general damages at

“Dated: February . ., 1950.”

If you decide in favor of the *defendant*, then you will use this form of verdict and indicate at

the place indicated such amount as you think he should recover as special damages and/or as general damages.

The other form of verdict reads as follows:

“We, the Jury in the above-entitled cause, find in favor of the defendant, Woodworkers Tool Works, a corporation, and against the plaintiff, William J. Byrne.

“Dated: February ..., 1950.”

If you find in favor of the defendant, then you will use this form of verdict.

Whatever your verdict is, it should be dated and signed by the foreman, and returned to this court.

Are there any objections to any of the instructions given or refused? If so, opportunity will be given to present such objections outside the hearing of the jury.

Mr. Callaway: Yes.

Mr. Olson: Yes. Mine is not an objection. It is a question I would like to ask outside the hearing of the jury.

(The following proceedings were had in the presence but out of the hearing of the jury:)

Mr. Olson: I have two questions. In the Sheward case the court held that in giving them an instruction the Court did not give an unavoidable accident instruction and that was sustained by the Supreme Court. So I object to the unavoidable accident instruction.

The Court: The court said that the failure to

give was not error. It was not specifically pleaded here, and I gave the instruction.

Mr. Olson: That is a minor one.

The Court: All right.

Mr. Olson: The other is that I feel that under the evidence in this case that the instruction that the plaintiff was free of any contributory negligence should have been given.

The Court: The reason I did not give it was twofold. There is nothing before the court, there is nothing before the jury—— [428]

Mr. Olson: I noticed that.

The Court: I did not state they pleaded contributory negligence. They are the ones, they did not request it and they did not argue contributory negligence. To give an instruction of contributory negligence would confuse the jury.

Mr. Olson: I wanted the instruction that under the evidence there is no contributory negligence.

The Court: I left it silent. I thought that over very carefully over the week-end and I decided not to do anything about it. They will think I am taking an issue away from them.

Mr. Callaway: I want to object to giving of the instructions on the doctrine of *res ipsa loquitur* on the ground that the courts have not extended that doctrine in the case of the manufacturer, to my knowledge, except in the beverage cases. Even *MacPherson v. Buick* is not a *res ipsa loquitur* case. I think that is the leading case on which all these cases are bottomed.

Mr. Olson: In answer to that, in answer to this Kalash case, it was a *res ipsa loquitur* case.

Mr. Callaway: I don't think it was.

Mr. Olson: Yes, it was.

The Court: Gentlemen, I am of the view that the Supreme Court of California has intimated that it will extend the case [429] to other manufactured objects than merely bottling cases.

Mr. Olson: They did in the Sheward case.

The Court: I am familiar with the cases. The objections will be in the record, and will be overruled.

(The following proceedings were had in the presence and hearing of the jury:)

The Court: For the benefit of those jurors who have not served in a case this term or served in a federal case before, I will explain to you that under federal law, in that respect, it differs from the state law. The court tells counsel before the arguments, in a general way, what the court's action has been on instructions that each side have submitted. And that is in order to enable counsel to anticipate and argue to you, to some extent, as to what the court is going to say about the law. But they do not actually know what the court is going to say about the law until all the instructions are read, and then the law requires them, after the instructions are read, to offer any objections or suggestions they have.

We live, fortunately, in a country where not even judges are supposed to be infallible. There is a

possibility of error, and this opportunity is given to counsel to call the court's attention to any omissions or errors in the instructions. The court may then consider them and if the court feels that the suggestions should be followed, the court then [430] modifies the instructions.

If, after discussing certain matters with counsel, the court decides that the instructions as given do not need any modification, then the instructions are not modified. These instructions, as I have given them to you, will stand.

The clerk will swear the bailiffs.

(The bailiffs were sworn by the clerk.)

The Court: You will now follow the bailiffs and begin your deliberations in the case. I presume I ought to inform you, although you may know it, that if after you organize you desire to go to lunch before you begin your deliberations, all you have to do is make that wish known. I will leave that to your determination.

You may want to do some work before you go to lunch. That will be up to you.

I hand the bailiff the two forms of verdict which he will turn over to you. You will now follow the bailiff and begin your deliberations in the case.

(The jury retired from the court room for deliberation.)

The Court: Mr. Clerk, I file with you the instructions given and the instructions refused.

Gentlemen, I demonstrated to you the correctness

of the procedure because you will notice that I withdrew, after I began to read the instructions, one or two which I felt were repetitious. Of course, I decided not to give any instructions [431] on contributory negligence or the absence of it, because the issue was not argued and I thought to give them either an instruction on the meaning of it or an instruction on the fact it did not exist would insert an issue which was not argued and, as I did not mention any particular defense in the instructions, that it would be better to leave that out.

Mr. Callaway: I would like a couple of stipulations from counsel. I would like it to be stipulated that in the event of a judgment for the plaintiff that execution be stayed for 10 days, until after proper motions before the trial court have been made.

Mr. Olson: That is automatic, isn't it?

Mr. Callaway: Is it in Federal Court?

The Court: No.

Mr. Callaway: I didn't think it was. Will you stipulate to that?

Mr. Olson: I don't know how I can stop you making any motion you want to. I don't understand what you want.

Mr. Callaway: I am asking for a stipulation. I want a stay of execution for 10 days, until all motions are made in the trial court, in the event of a judgment for the plaintiff.

Mr. Olson: I think it is the customary thing.

Mr. Callaway: Will you so stipulate?

Mr. Olson: Yes. [432]

The Court: We will stay at recess until we hear from the jury.

(Thereupon, at 12:20 o'clock p.m. a recess was taken until 6:10 o'clock p.m. of the same day.) [433]

Monday, February 20, 1950

The Court: Let the record show the jury have returned.

Mr. Caldwell, you are the foreman of the jury?

Mr. Caldwell: Yes.

The Court: Mr. Caldwell, in answering the questions be careful in the way you answer them, because while there are certain matters you are permitted to disclose in Federal Court there are certain matters that go on in the jury room that cannot be disclosed.

If I ask any question relating to the manner in which you stand, do not refer to any person. Answer my questions in a general way. Do you understand?

Mr. Caldwell: Generalities.

The Court: You sent me a statement a while ago stating you thought you were hopelessly in deadlock, is that not true?

Mr. Caldwell: That is true.

The Court: What was the answer I sent to you through the clerk?

Mr. Caldwell: To carry on for a while longer.

The Court: Now it is after 6:00 o'clock, and I

asked the clerk a while ago to ask you jurors if you desired to go to dinner. Your answer was what?

Mr. Caldwell: At 7:00 o'clock.

The Court: You wanted to wait until 7:00 o'clock? [434]

Mr. Caldwell: That was the consensus of opinion, yes.

The Court: All right. Do you believe that further deliberation will result in a verdict?

Mr. Caldwell: My belief is it may.

The Court: All right. Now, let me ask you one other question. Would any amplification of any instruction assist you in any way.

Mr. Caldwell: At the time the panel was made up there were certain questions propounded to each juror.

The Court: Yes.

Mr. Caldwell: Would it be in order to have those questions propounded again?

The Court: No, that cannot be done. That has passed. Those matters relate merely to the qualifications of the jurors to act in a particular case, and those are beyond any matters of inquiry at the present time.

The only way I can be of any assistance to you is to amplify any instructions that have been given or to have any portion of the evidence read that has been given. As you know, everything is taken down by the reporter and any portion can be read back that you might request or any other juror. Any portion of the testimony can be read back as

to which there may be any argument or dispute about in your minds. If it takes hours, we will stay and do it.

You jurors are new at this and I am merely indicating in [435] this manner that if there is any way in which the court can help, I will do so, because both counsel and the court are anxious there be a verdict in this case.

I do not want to crowd you. If you need more hours, we will stay here all evening, if necessary. The only reason I brought you down is because, frankly, I misunderstood the message, the message you sent me about dinner. I understood the message to contain an implication that you wanted to deliberate until 7:00, that you might reach a verdict, or I possibly would not have called you in. At any rate, no harm has been done.

Ladies and gentlemen of the jury, I have given you the instructions. Our duty is over. It is up to you to follow the instructions and the law, as you have sworn to do. As to the facts, it is up to you to interpret the facts. The facts are the facts that were testified to in this court, and nothing else. I cannot give you any additional testimony. You cannot draw on anything that you yourselves may know. Counsel cannot get up and make further argument. All we can do is to give you additional instructions or read any portion of the testimony you may desire. Your verdict must be based upon what is in this record. What is not in the record we cannot supply at this time, it is too late.

It may well be that counsel for one side or the other missed something, and that something that is missing may give [436] you some trouble. If what I say does not meet with the approval of counsel, they will ask that it be rectified. They have a right to do that. I am merely telling you that we can do certain things, and if those things will be of any assistance to you we will give them to you. They consist only of giving you additional instructions on the law or reading to you any portion of the testimony as to which there may be any doubt. That may relate both to the depositions and to the testimony, oral testimony that was given. I would not send out the depositions because there are portions of the depositions stricken out. Any portion of the depositions that was allowed that you want to have read again, it will be done.

Do any of the jurors have any desires in that manner?

A Juror: Your Honor, I would like to have the instructions as to the evidence presented here in court, whether the jurors must abide by the evidence or can set evidence aside for something more constructive.

The Court: Well, I can only repeat that the evidence on which the case must be based is the evidence given in this court. No juror has the right to be governed by anything he may know that goes counter to the evidence. Of course, as an ordinary person he has a right to draw inferences from evidence of the type that any reasonable

person would draw. That is about all the answer I could give to that [437] question.

A Juror: I understood your Honor to read in your instructions to the jurors they can either believe some portion of the evidence or believe the whole of it or part of it, or none at all.

The Court: There was no such instruction.

Mr. Clerk, let me have the instructions.

The Clerk: I believe they are upstairs in the jury room. The jurors have them.

The Court: I will send the bailiff to get them. All I said was this: That you are the sole judges of the evidence and the effect of the evidence, and that in determining that effect you must be governed by the manner in which witnesses testify and by their demeanor on the stand and their interest in the case. That is what you may be referring to, that a witness false in one part of his testimony may be distrusted as to others.

But even as to such a witness, if you believe that he falsely testified as to some matters you may, notwithstanding that fact, still believe that he told in other particulars the truth. That is the reference. I did not say you should disbelieve all the testimony. If you did that you would be in a position where you could not render a verdict for the plaintiff or the defendant.

What I said was this: "Preponderance of the evidence [438] means the greater weight of the credible evidence as you find it to be. Or such evidence as, when weighed with that opposed to it, has more convincing force, and from which it re-

sults that the greater probability is in favor of the party upon whom the burden rests.”

I explained to you that in a case like this the plaintiff, who brings the law suit, has the burden of proving negligence.

In determining the credibility of the witnesses, I said, “A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and being convinced that a witness has stated what is untrue, not as the result of mistake or inadvertence, but wilfully and with a design to deceive, you must treat all of his testimony—” that is, the testimony of that particular witness— “with distrust and suspicion, and reject it all unless you shall be convinced notwithstanding the base character of the witness, that he has in order particulars sworn to the truth.”

That is all I said.

I did not mean to say that you can reject all the testimony in the case. If you got that impression then you have misinterpreted the court’s instruction, because a juror cannot reject all the testimony offered by both sides, and just sit still, because then you are not in a position to render a [439] verdict. That is why you are instructed as to the burden of proof, so that you will see that if matters are evenly balanced, then you have to decide the case according to the preponderance of the evidence, and I explained what is meant by preponderance of the evidence.

A Juror: That is all I wanted to know, your Honor.

The Court: Are there any other jurors who would like to ask any questions?

(No response.)

The Court: Do counsel desire to add to anything I have said?

Mr. Callaway: I would think only that the court might tell the jury they are not permitted to guess or speculate or surmise, but the verdict must be based on the evidence introduced here.

The Court: That is covered in the instructions. I said in the first part of the instructions, "You are the sole judges of the effect and value of the evidence. Your power, however, of judging of this effect and value of the evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence." And then I went on to say that you do not have to decide in conformity with the number of witnesses against a lesser number, if the lesser number carries conviction to you. Mr. Olson?

Mr. Olson: I might, in view of the court's remarks [440] regarding burden of proof, state that perhaps another reading of the *res ipsa loquitur* instruction on that burden might help the jury.

The Court: They have the entire instructions. I am merely trying to amplify them. The instructions can be taken back to the jury room with the jury. What I read is right in the printed instructions as I have given them to the jury.

I read verbatim from these instructions. Bear in mind these are the court's instructions. In other words, as I told you before, while counsel have the right, and, in fact, it is their duty to inform me on a subject on which they want instructions given, these instructions are taken and rewritten by the court. The instructions as given are not the instructions submitted by the plaintiff or submitted by the defendant. They are the instructions given by the court. They are even rewritten on government paper, so that they are my instructions. You are not to speculate as to where these instructions came from. They are the law as I expressed it to you. If I am in error, then the higher court corrects me.

If you want that portion read, I will read that portion. I will read the portion as follows:

“There is in our law a doctrine applying to negligence cases which is commonly known as the doctrine of ‘*res ipsa* [441] *loquitur*’. Literally translated from the Latin, this means ‘the thing speaks for itself.’

“That doctrine means that if a subject matter is shown by the evidence to have been manufactured and supplied for a particular use, and an injury to some person results from such usage, which would not have occurred in the ordinary course of things, if ordinary and proper care had been used in its manufacture, the thing or subject matter speaks for itself, and the law raises the presumption that the manufacturer did not use ordinary and proper care in its production. The burden would then be on

the manufacturer to substantially prove that ordinary and proper care was used in the manufacturing and supplying of such subject matter.

“However, the manufacturer is not responsible for defects that cannot be found by a reasonable, practicable inspection.”

Along with that instruction I will read the instruction as to reasonable care in making the inspections and tests during the course of manufacture which the manufacturer should recognize:

“You are further instructed that reasonable care under this instruction consists of making inspections and tests during the course of manufacture, and after the article was completed which the manufacturer should recognize were reasonably necessary to secure the production of a safe article.”

And further, “Therefore, if you find that the defendant [442] properly made inspections reasonably designed to find defects which would render the panel raiser head unsafe for cutting and trimming wood, you must find that those inspections were reasonable.”

There are many more on both sides. I am not going to take the time to read them. Mr. Olson suggested I read that, and I read both instructions that set forth that question.

Are there any other questions?

A Juror: Your Honor, as I understand your instructions to read, if a juror has found that one witness' evidence does not set right with him, has he a right to set it aside or part of it aside?

The Court: What I meant to say is this: If his testimony does not appeal to you, then one of two situations may arise. If that testimony is proven by other witnesses, then you can follow those witnesses. If that testimony is contradicted by some other witness, you can believe that other witness.

In any event, in a case like this, where there is testimony on one side over the other, you have to believe one side or the other.

Mr. Caldwell: Thank you, your Honor.

The Court: Is there anything further?

Mr. Olson: No. I have nothing further. [443]

The Court: We have worked long hours. I am as interested as you gentlemen are to see this jury arrive at a verdict. If there is any doubt in the mind of a juror about anything I want to try to be helpful. I realize the jurors are new, and I am trying as best I can, without violating the proprieties here, to be helpful.

Mr. Olson: You read the instruction regarding reasonable care. I think, to follow that up, I would like the instruction regarding the degree of reasonable care necessary, according to the product——

The Court: All right. I will read that.

Mr. Olson: I would like that.

The Court: “You are instructed that the degree of care necessary to be exercised by a manufacturer in the production of a product varies with the danger to be expected from the product, and you are further instructed that the kind of inspection called for on the part of the manufacturer varies with the nature and danger of the thing inspected.”

If the jury desires to go to dinner and come back and deliberate further, we will all go to dinner and come back later and give the jury more time.

I have no desire to force you to decide this case sooner than you are ready. However, I want you to know that if the foreman had answered for you and I, upon inquiry, had found out that you had not changed your views and there was [444] no use to confer any further, I would have discharged you. Evidently you have changed your view as to what the situation was earlier, when I suggested that you work some more. The foreman has indicated that he believes that further discussion may result in a verdict.

Are you all of the same view at the present time?

A Juror: We are all, but possibly one.

The Court: If a majority feel that a verdict is still possible, then I will have you retire to the jury room and you can indicate to the clerk whether you want to be left alone for some time or you want to go to dinner and deliberate further.

You will withdraw to the jury room and then you can indicate to me in the next 15 minutes whether you want to go on and attempt to arrive at a verdict or if you desire to go to dinner.

I will return the instructions to the bailiff, for your benefit.

(Short recess taken.)

The Court: Gentlemen, I have another message from the jury. It is now 6:25. They say they want to go to dinner. Then they say that they would like

to have read to them "those portions of Mr. Meissner's deposition relating to the effect or defect in the casting to be found in the concluding portion of his testimony." [445]

Do you want me to look that up?

Mr. Olson: I think I can find it real quickly.

Mr. Callaway: I think the reporter ought to read it from her notes. I don't know what part of the deposition was read.

The Court: I do not care which procedure is followed. I think Mrs. Pickering can locate it and the portions of the deposition, and then we can call them back and have it read, and after it has been read we can ask them if there is any other portion they desire read.

Mr. Olson: Will you read me the note again, please?

The Court: "Those portions of Mr. Meissner's deposition relating to the effect or defect in the casting to be found in the concluding portion of his testimony."

Mr. Olson: Is your Honor intending to let them eat first before we do that?

The Court: Yes. Off the record.

(Discussion off the record.)

The Court: On the record.

All right, gentlemen. We will stand at recess until we hear from the jury further.

(Thereupon, at 6:30 o'clock, p.m., a recess was taken until 9:25 o'clock, p.m., of the same day.) [446]

Monday, February 20, 1950

The Court: Let the record show the jury have returned.

Ladies and gentlemen of the jury, your foreman sent word that you wanted to have read to you certain portions of Mr. Meissner's deposition, especially toward the end of the deposition, where it deals with the manner of discovering flaws. I do not have the wording of the request before me.

Mr. Olson: I might help you.

The Court: All right.

Mr. Olson: I took down the exact words.

The Court: "Those portions of Mr. Meissner's deposition relating to the effect or defect in the casting to be found in the concluding portion of his testimony."

While we were at dinner I had the reporter go through the deposition and her notes, and she will read to you the portions that we have identified as covering the particular topic. If, after they have been read, there are other portions that you want to refer to, we will try to locate them.

The Reporter (Reading):

"Q. Do you know what inclusion in a casting is, or porosity?

"A. Porosity, are you talking about density now, when you say porosity? [447]

"Q. Well, I don't know, to be honest with you.

"A. I couldn't know, no.

"Q. (By Mr. Johnston): Now, blow-holes, gas holes, and air holes all have the same effect on the

metal; is that correct? A. They would.

“Q. They are all substantially the same?

“A. Yes, they are all the same.

“Q. Now, if you found blow-holes in any of these castings, did you use the casting, or discard it?

“A. That was immediately discarded.

“Q. And there were some of them in this particular batch which were discarded because of blow-holes; is that correct? A. There was none.

“Q. None of them? A. No.

“Q. Blow-holes are structural defects in steel of this type, are they not?

“A. A blow-hole is a structural defect in any steel.

“Q. (By Mr. Johnston): And a blow-hole in steel of this type, if large enough, will be a very dangerous [448] condition is that not true?

“A. No, I wouldn't say it would be a dangerous condition.

“Q. No matter how large they are?

“A. No matter how large they are.

“Q. Or how small? A. Or how small.

“Q. Or how many there are, or how few there are? A. No.

“Q. They are still not a dangerous condition?

“A. They are still not dangerous; does he say——

“Q. And they don't constitute a dangerous or structural defect in the steel? A. No.

“Q. You are sure of that?

“A. Not in this particular instance.

“Q. Now, wouldn’t the blow-holes, if they were either large or if there were a number of them,—wouldn’t they reduce the strength of the steel?

“A. It would weaken it, but it would not weaken it to the point where it would be dangerous. [449]

“Q. (By Mr. Johnston): That is your answer?

“A. That is my answer.

“Q. You are sure of that?

“A. I am sure of that.

“Q. Under no circumstances could a blow-hole weaken the steel to the point where it would constitute a dangerous structural defect?

“Q. (By Mr. Johnston): You have seen many blow-holes in steel, haven’t you?

“A. I have never seen one in a panel raiser head.

“Q. (By Mr. Johnston): You have seen blow-holes in the steel, in other metals?

“A. I have seen it in cast iron, not cast steel.

“Q. Never seen it in steel?

“A. Never seen it in steel.

“Q. Under no circumstances could a blow-hole weaken a steel casting to the point where it would constitute a dangerous structural defect?

“A. No, it could not; not the way that was manufactured; it would be impossible.

“Q. Cast steel? A. That is right.

“Q. In making that answer you are depending on [450] your knowledge of the Gunitite Foundries, and the type of steel foundry, and on the castings they furnished; is that right?

“A. That is right.

“Q. Rather than on your own knowledge?

“A. I am depending on them, as well as my own knowledge; because I know them to be a good manufacturer of these steel castings, good clean castings.

“Q. And you know of your own knowledge that blow-holes could not constitute a structural dangerous condition on steel castings of this type?

“A. That is right; they could not.

“Q. Now, blow-holes can be ascertained by magnafluxing or taking X-rays; is that correct?

“A. A magnaflux is a test for crack.

“Q. Would it not also show up blow-holes, if they were to the surface?

“A. If they were to the surface, yes.

“Q. And X-rays would show up blow-holes and cracks, both, would it not?

“A. That is right. I am just basing my knowledge on what I know of X-raying steel.

“Mr. Hubbard: You don't have any experience with that? [451]

“The Witness: No, I don't.

“Q. (By Mr. Johnston): But you never used, in connection with your company here, the defendant, either of those tests, magnaflux or X-ray?

“A. Not magnaflux; we discussed X-rays more already.

“Q. Did you ever use X-rays?

“A. I don't know how to use an X-ray machine.

“Q. Did your company, as a matter of practice, during the time you got these castings in and had

them in your storage bin, ever have them X-rayed, aside from this one time trying to determine whatever you mentioned here a while ago, the date of which—— A. I don't know the date.

“Q. Was the particular casting from which this particular panel raiser head in question was manufactured, was that casting ever X-rayed, to your knowledge, by anybody in connection with your company, or for your company; yes or no?

“This particular one?

“Q. Yes. A. No, it was not X-rayed.

“Q. Was it tested in any other way for blow-holes, [452] or anything else of that kind?

“A. It was inspected and checked for blow-holes during the operations.

“Q. Was any test made with magnesium—was any test made for magnesium, phosphorus or sulphur content in that particular casting?

“Q. (By Mr. Johnston): You have no knowledge of the tests that were made at the foundry at all, do you? A. No.

“Q. Well, were any tests made by or for your company which would determine what the composition of the casting in question was, prior to the time you made it up?

“The Witness: When I placed this order I order cast steel.

“Q. (By Mr. Johnston): Yes; did your company make any test of the composition of that casting, after you got it,—the composition of the casting? A. After we got it?

“Q. After you got it? A. No.

“Q. At any time before the head was delivered, were any tests made of the composition of the casting? A. Not to my knowledge. [453]

“Q. (By Mr. Johnston): If there had been any such tests, you would have known about them, would you? A. Yes, I would say so.

“Q. (By Mr. Johnston): It was not the standard practice, though, to make any tests?

“A. No. I might add, it was not necessary, out of cast steel.

“Q. (By Mr. Johnston): Was an open hearth or electric furnace used in casting the steel; do you know which one was used?

“A. That I cannot say, how that metal was prepared.

“Q. Don't you know that the electric furnace method is far superior?

“A. I am no foundry man, as well as metallurgist.

“Mr. Johnston: Then your answer is, you don't know, all right.

“Q. What was the method of casting employed; were steel molds or centrifugal casts used?

“A. I cannot say what their methods of casting it are.

“Q. You don't know if centrifugal casts were used the segregation in the metal would be[454] less; you don't know that?

“A. I could not say.

“Q. If there are a number of small blow-holes

in any steel casting of the type we have mentioned here, it will weaken the strength of the steel; is that not a fact?

“Mr. Johnston: Let me add something to that: As contrasted to any other casting of the same type, size, shape, and all have the same components, in which there are no blow-holes; that is, as between the casting with blow-holes and the casting without blow-holes, the one with blow-holes is the weaker; is that true?

“A. That is true; but when you are talking about blow-holes I would like to talk about blow-holes in this head.

“Q. (By Mr. Johnston): We are not concerned with blow-holes in this head.

“A. It is bound to be weaker.

“Q. (By Mr. Johnston): Will you tell us, please, whether an excess of magnesium, phosphorus, or sulphur, could cause the head to break?

“A. No.

“Q. (By Mr. Johnston): Now, do you know the operating revolutions per minute, what would be normal for the use of this head? [455]

“A. What would be normal safety r.p.m. would be about——

“Q. By r.p.m. you mean revolutions per minute?

“A. Yes; say from 3200 to 7200 would be safe normal operating speed.

“Q. And you might possibly even go to 10,000 on soft pine lumber, is that right,—safely?

“A. Oh, yes; there is a safety margin that it would sustain beyond that 7200, yes.

“Q. Up to 10,000 r.p.m.?

“A. You could operate it; I cannot say you could operate it as safely as on 7200.

“Q. But without nails, knots, or gravel, you could operate up to 7200?

“A. You could operate; but I would not say operate it safely.

“Q. What would be the safe limits?

“A. 7200, top limit.

“Q. That is the maximum?

“A. That is the approximate recommended maximum speed; different shapers run different speed.

“Q. The recommended speed of 7200, wasn't it; where was the maximum of safety? [456]

“A. There is a margin of safety way beyond that.

“Q. Yes, up to 10,000 r.p.m.?

“A. Yes, easily; but your safety is decreasing when you go up that high.

“Q. But still, in soft pine lumber, without knots or other obstructions in the line, up to 10,000 r.p.m. would be safe for normal operating, if the machine is in proper adjustment, and all that; is that right?

“A. Soft pine would not have anything to do with it; it is such a shear cutting there it would cut hard or soft.

“Q. Assume clear lumber, without obstructions, up to 10,000 would be safe?

“Mr. Hubbard: I object, because the question here does not contain all the elements necessary to answer the question. You would have to have several others.

“Mr. Johnston: He has already said 7200.

“Mr. Hubbard: He has told you that 3200 to 7200.

“Q. (By Mr. Johnston): 3200 to 7200 is the normal recommended range, is that right?

“A. About that, yes. [457]

“Q. What would the top maximum before an operation would become unsafe because of the speed?

“A. I wouldn't know what the top would be; all I know is what is safe.

“Q. Well, would the top be anything over 7200?

“Mr. Hubbard: I object. It has been answered.

“A. The top is about 7200.

“Q. (By Mr. Johnston): Give me a figure,—a thousand over, five hundred over?

“A. You could probably run beyond 20,000; I am not saying it would be safe.

“Q. I am talking about the top operating maximum.

“A. I am saying 7200, maybe 7500 will be safe; I am not saying anything over will be safe.

“Q. Now, in making these heads, you do know, do you not, that if the casting is defective that might constitute a danger to the workman operating the head?

“Mr. Hubbard: I object to that, because there is no showing here that there was a defective head.

“A. No, there is no danger.

“Q. (By Mr. Johnston): Even if the head is defective? [458]

“A. What do you mean by defective?

“Q. Well, let us assume that the head has a crack through it, a blow-hole through it, halfway through the arm, would that be dangerous to operate?

“A. That would not be dangerous under normal usage, no.

“Q. It would not? A. It would not.

“Q. You are sure of that, are you?

“A. I am sure of that, under normal usage.

“Q. Positive?

“A. Positive; because that cut is so light.

“Q. Assuming that the arm down here at the base, between where the arm joins onto the rest of the casting,—assume there were a blow-hole in there, and assume that that was maybe one-quarter inch long, and varied in width from, oh, two or three thousandths, up to maybe .040 or .050 of an inch, and so extended through the width for perhaps .010 or .015 of an inch, would that constitute a dangerous condition in the head, under normal usage?

“A. Assume he hits a spike?

“Q. No, under normal usage; forget all about spikes. [459]

“A. No, under normal usage that would not be a dangerous condition to operate that head.

“Q. You are sure of that?

“A. I am sure of that.

“Q. And assume it hit a spike or a knot or a nail, would it then constitute a dangerous condition?

“A. A knot, no; spikes, I couldn't answer. I

don't know how that spike is arranged in that wood; I don't know how the operator is speeding the lumber, or how fast; I couldn't answer.

“Q. Yes; now I am going to ask you to assume the following facts,—now, please bear in mind that this has nothing to do with your particular case, it is not your particular head, although it may sound that way; but if you will listen carefully, these are all assumed facts, simply for the purpose of the question; assume the following facts: That on or about October 28, 1948, in or near Los Angeles, California, a workman is using a new Champion panel raiser head with a $1\frac{1}{4}$ inch bore, right hand, designed and manufactured by your company for cutting lumber; that this panel raiser head has an upper and lower cutter, which has been properly installed [460] upon a double spindle shaper; this panel raiser head has had less than three hours use; it is operated up to that time without any difficulty, and in perfect normal and proper fashion; the workman or operator is using this panel raiser head upon new soft pine lumber containing no gravel, nails, or other hard objects; he is cutting the lumber, or shaping it to make a door; he is using ordinary and reasonable care for his own safety in such operation; now, if that panel head had been manufactured with ordinary and reasonable care, inspected with ordinary and reasonable care, installed with ordinary and reasonable care upon a double spindle shaper, and if the installation had been inspected and found proper, and if it had operated and been

found proper for over two hours prior to the time in question, and if at the time in question it was being operated with ordinary and reasonable care and without striking any hard object, such as a nail, stone, or other hard object in the wood, no breakage of or damage to the raiser head would result, would it?

“Q. (By Mr. Johnston): All right. Now, under those circumstances no breakage or damage to the head would result, would it? [461]

“A. Under normal usage, no.

“Q. Now a further question: Under those circumstances which I have detailed, the panel raiser head would not break and disintegrate, would it?

“A. No.

“Q. And the circumstances I have described are what you would term normal operation, are they not?

“A. If everything is right, and we know it to be right, and I should know it——

“Q. I am talking about the elements that I detailed; they are all what you would include in normal operation; if not, tell me.

“The Witness: A. I would say yes.

“Q. And under that kind of operation, under those circumstances, the head would not break, in normal usage?

“A. In normal use, no.

“Q. Or in use of the kind I have described, is that right?

“A. That is right.

“Q. What could cause breakage of the head under the conditions I have described; a weakening of the head by a blow-hole, if the blow-hole were [462] large enough, at the point down here in the base in the arm could cause it, couldn't it?

“A. Under normal usage, no; that head would break the first ten minutes, rather than wait two or three hours, like you say.

“Q. Now, you are sure of that?

“A. That is right; that would break right away.

“Q. You have made tests of defective heads to see when they would break, and found that they would break right away; is that it? What do you base your opinion on?

“A. Something happened in that head, in the meantime.

“Q. But what do you base your opinion on, that the head would break right away rather than after three hours usage?

“A. It is going just as fast in ten minutes as after three hours; I would say it would break immediately if it is going to break at all.

“Q. And structural defects in the steel could cause it to break, couldn't it?

“A. No, it could not, under normal uses, as you explained.

“Q. Under normal usage, structural defects [463] could never cause the head to break?

“A. Could not cause the head to break; that is made so substantially, out of cast steel; no.

“Q. You are positive of that?

“A. I am sure of that.

“Q. No matter what the condition or size of the blow-holes? A. That is right.

“Q. It doesn't make any difference?

“A. It wouldn't make any difference.”

“Q. In other words, if the blow-holes went half-way through the steel, it wouldn't make any difference?

“A. I have tried it this morning, and it didn't make any difference.

“Q. With blow-holes through it?

“A. With a hole drilled through it, larger than any blow-hole.

“Q. Now, at the time your company manufactured the particular head in issue here, you knew that it would be operated by a workman; isn't that right? A. Oh, yes.

“Q. And you also knew at that time that unless it was structurally sound that it might break [464] and injure somebody; is that true, unless it was structurally sound,—that it might break and injure somebody? A. It was structurally sound.

“Q. Answer my question: You knew at the time you made it that if it were not structurally sound it might break and injure somebody?

“A. What do you mean, not structurally sound?

“Q. What do you mean by structurally sound?

“A. Structurally sound is the way we make them, design it.

“Q. Then you knew unless the head was structurally sound it might break and injure somebody;

you know that is the case of every tool you make?

“A. They are structurally sound; they are inspected.

“Q. Let us forget this particular head, for the moment. You and I don’t see eye to eye, because you think I am trying to do one thing, when I am trying to do another.

“Q. (By Mr. Johnston): In the case of any tool that your company makes, if it is not structurally sound, if it is not propely made, it may be unsafe for the person who uses it;—you know that, don’t you?

“The Witness: A. If it is not structurally [465] sound, yes.

“Q. (By Mr. Johnston): And if this particular head had turned out not to be structurally sound, it might injure somebody; isn’t that true?

“A. No, not the way it is designed.”

The Court: Ladies and gentlemen of the jury, we had gone over and marked these pages and checked them against the notes of the reporter, and so far as we can all tell those portions read by the reporter are the evidence that bears upon that particular subject.

Was there any other portion that you wanted read, or are you ready to retire and discuss the matter further, in the light of what has been read?

Mr. Caldwell: Your Honor, with your permission the jury feels they would like the reporter to read a little further than she did. The point they wanted brought out we were just about up to. Toward the conclusion of the deposition.

A Juror: I hope I can make it so it won't sound improper. What I would like to ask is could or should any member of this jury who has some knowledge of the use of machines draw any conclusions from that?

The Court: No, no juror should bring into this case any of his own knowledge about machinery, or anything of that sort.

The Juror: We should go on the evidence produced here? [466]

The Court: The only evidence that can be produced as to the condition of the machine is the evidence in the record and the inference that you can draw from it. If a man has mechanical knowledge or mechanical skill or has operated this machine, he has no right to tell the other jurors about it. He is not under oath as a witness. He is a juror, not a witness.

A Juror: But, your Honor, I brought the question up before, if your Honor pleases, that a juror has the right to doubt a witness' veracity in his statements.

The Court: That is true. You have a right to disbelieve the testimony of a witness. But you have no right, in doing so, to substitute anything you know in order to impeach his testimony.

The Juror: The only thing I have said——

The Court: I do not want to hear anything you have said. You cannot disclose anything you may have on your mind. We are asking general questions.

If you do not believe the testimony of a witness, then you need not accept it. But that disbelief must arise, not by pitting your knowledge against what he testified to, but something which makes his testimony improbable because it is contradicted or goes contrary to ordinary experience.

If a witness should say, "At the present time this is a dark room," you would not have to take his word for it, even [467] if he were under oath. Do you understand?

The Juror: Yes.

The Court: But if a witness testifies that a certain piece of machinery was in a certain condition when it left the factory, you have no right to say, unless he is contradicted by another witness, it was not in that condition.

I will put it this way: You have no right to say it is not in that condition, unless the testimony in the record contradicts it, or unless it be an object which is before you and you can, by examining it, say it was in that condition. In other words, a juror is not required to take the testimony of a witness which, by physical facts in front of the juror is shown not to be correct. He has no right to substitute the knowledge he may have generally as to machinery for what a witness testifies.

Gentlemen, if you have no objection, we might as well——

Mr. Olson: I have no objection to the whole deposition.

The Court: ——have the jury take the original

deposition, which is not marked up except that I have indicated by clips the portions that were read.

Ladies and gentlemen of the jury, remember if you read the deposition over to eliminate the arguments of counsel and the discussions of counsel. Sometimes you may have to skip a whole page in order to find an answer to a question.

Mr. Callaway: I have no objection. [468]

The Court: All right. Mr. Caldwell, you take the deposition along, if it will help the jury. It contains the deposition of Mr. Knourek, also. If it will help you in your discussion in the matter, go ahead and use it.

Let the record show the jury have retired again to resume their deliberations.

(Thereupon, at 10:05 o'clock p.m., Monday, February 20, 1950, a recess was taken until 1:45 o'clock a.m. of Tuesday, February 21, 1950.)

Los Angeles, California, Tuesday, February 21, 1950
1:45 a.m.

The Court: Let the record show the jury have returned.

Ladies and gentlemen, have you arrived at a verdict?

The Foreman: We have.

The Court: Will you hand the verdict to the bailiff.

The clerk will read the verdict.

The Clerk: (Reading)

“United States District Court, Southern
District of California, Central Division

“No. 9134-Y Civil

“WILLIAM J. BYRNE,

“Plaintiff,

“vs.

“WOODWORKERS TOOL WORKS, a Corpora-
tion,

“Defendant.

“VERDICT

“We, the Jury in the above-entitled cause, find in favor of the plaintiff, William J. Byrne, and against the defendant, Woodworkers Tool Works, a corporation; and fix plaintiff’s special damages at Eight Thousand Dollars, and fix plaintiff’s general damages at One Thousand Dollars.

“Dated: February 21st, 1950.

“GEO. F. CALDWELL,

“Foreman of the Jury.”

The Court: Do you desire the jury polled?

Mr. Lopardo: Yes.

The Court: Poll the jury.

As your names are called, please answer the question propounded to you.

The Clerk: Israel H. Marcus, is this your verdict as presented and read?

Mr. Marcus: Yes.

The Clerk: Iva M. Shaheen, is this your verdict as presented and read?

Mrs. Shaheen: Yes.

The Clerk: Mario C. Negri, is this your verdict as presented and read?

Mr. Negri: Yes.

The Clerk: Muriel M. Treulich, is this your verdict as presented and read?

Mrs. Treulich: Yes.

The Clerk: Owen K. Umstead, is this your verdict as presented and read?

Mr. Umstead: Yes.

The Clerk: Homer B. Terrill, is this your verdict as presented and read?

Mr. Terrill: Yes.

The Clerk: Maude S. Pande, is this your verdict as presented and read? [471]

Mrs. Pande: Yes.

The Clerk: Mary A. Walsh, is this your verdict as presented and read?

Mrs. Walsh: Yes.

The Clerk: Louise D. LeVine, is this your verdict as presented and read?

The Clerk: Geraldine Gale, is this your verdict as presented and read?

Mrs. Gale: Yes.

The Clerk: Jane A. Babcock, is this your verdict as presented and read?

Mrs. Babcock: Yes.

The Clerk: George T. Caldwell, is this your verdict as presented and read?

Mr. Caldwell: Yes.

The Court: The clerk will enter and record the verdict.

Ladies and gentlemen of the jury, I desire to thank you for your services in this matter. I regret the case kept you out so long. However, as I stated to you earlier in the evening, if you had informed me before you went to dinner that there was no possibility of a verdict I would have discharged you. I did not want to discharge you when I received the first message in the afternoon. I felt there was still a possibility of a verdict. You knew at all times [472] all you had to do was state to the court you had reached an impasse and the court would have discharged you. You chose to remain and work the matter out. I want to thank you for your efforts in this matter.

You will be excused until further notice.

The Court will stand adjourned. Stay of execution will be granted for a period of 10 days, until such motions as are necessary have been made. Counsel will give notice and then we will fix the time for the ruling. I will fix time for any argument and ruling on the reserved motion for the same time.

Mr. Lopardo: How many days do we have to give?

The Court: The same as for the motion for a new trial. There is no limit as to my power. I merely set it for the same date. Your notice must be given, and afterwards there is no time limit.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of April A.D., 1950.

/s/ VIRGINIA K. PICKERING,
Official Reporter.

[Endorsed]: Filed April 19, 1950.

United States District Court, Southern District of
California, Central Division

No. 9134-Y Civil

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS,

Defendant.

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of Califor-

nia, do hereby certify that the foregoing pages numbered from 1 to 116, inclusive, contain the original Amended Complaint for Personal Injuries; Summons and Return of Service; Notice of Motion to Dismiss Action and Quash the Return of Service of Summons; Affidavits of E. H. Preuer, Robert E. Dunne, Ray Taylor and William R. Walker; Second Amended Complaint for Personal Injuries; Answer to Second Amended Complaint; Motion to Dismiss First Count or Cause of Action of Second Amended Complaint and for a More Definite Statement; Notice of Motion; Decision on Motions; Stipulation re Deposition; Requested Jury Instructions Refused by the Court; Verdict; Judgment on Verdict; Notice of Entry of Judgment; Motion for Judgment non obstante veredicto and for New Trial; Motion to Amend Verdict and Affidavit of George F. Caldwell; Amended Judgment on Verdict Notice of Entry of Amended Judgment; Supersedeas Bond; Notice of Appeal and Designation of Record on Appeal and full, true and correct copies of Minute Orders Entered March 21, 1949, and March 13, 1950, which, together with original plaintiff's exhibits 1, 2, 2-A to 2-D, inclusive, 3 to 9, inclusive, and original defendant's exhibits A to G, inclusive, and original reporter's transcripts of proceedings on March 21, 1949, February 16, 17 and 20, 1950, and March 13, 1950, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and

certifying the foregoing record amount to \$2.40 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 15th day of May, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12548. United States Court of Appeals for the Ninth Circuit. Woodworkers Tool Works, a corporation, Appellant vs. William J. Byrne, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals,
Ninth Circuit

No. 12548

WOODWORKERS TOOL WORKS, a corporation,
Appellant,

vs.

WILLIAM J. BYRNE,

Appellee.

DESIGNATION OF RECORD

Comes Now the appellant Woodworkers Tool Works, a corporation, and designates its record on appeal as follows:

1. The entire Clerk's Transcript as certified in the lower court.

2. All of the Reporter's Transcripts consisting of three volumes dated on the front cover thereof as follows: February 16, 1950, February 17, 1950, and February 20, 1950, respectively.

3. The following documentary exhibits introduced by the plaintiff—Exhibits number 3, 6, 7, 8 and 9.

4. The following documentary exhibits introduced by the defendant—Exhibits "A," "C," and "D."

No depositions, whether or not designated as exhibits are to be printed for the reason that the material portions of all depositions were read into

the record and are a part of the Reporter's Transcript.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 23, 1950.

[Title of Court of Appeals and Cause.]

MOTION TO CONSIDER EXHIBITS IN
ORIGINAL FORM

Comes Now Woodworkers Tool Works and moves the above-entitled court for permission to have the following enumerated exhibits considered in their original form without the necessity of having photographs there of included in the record:

Plaintiff's exhibits 1, 2, 2-A, 2-C, 2-D, 4 & 5, 3, 6, 7, 8 and 9.

Defendant's exhibits "B," "E" & "F," "C" and "D."

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Appellant.

It Is So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge, United States
Court of Appeals.

/s/ WILLIAM HEALY,
Judge, United States Court
of Appeals.

WM. E. ORR,
Judge, United States Court
of Appeals.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 15, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes Now the appellant Woodworkers Tool Works, a corporation, and states the points on which it intends to rely on appeal as follows:

1. It was error for the trial court to deny appellant's motion to dismiss action and quash the return of service of summons, for the reason that there never was any service of process upon Woodworkers Tool Works or any of its agents.

2. The verdict of the jury was contrary to law in that the special damages awarded to appellee were in excess of those pleaded or proven.

3. There was no evidence of negligence on the part of appellant.

4. There was no evidence showing, or tending to show, a causal connection between the breaking of the Champion Panel Raiser Head and the injury of the appellee.

5. It was error for the trial court to instruct the jury that the doctrine of *Res Ipsa Loquitur* was applicable.

6. It was error for the trial court to permit the Foreman of the Jury to impeach the verdict of the jury.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 23, 1950.

